

No. 87-416-CFX
Status: GRANTED

Title: United States Catholic Conference, et al.,
Petitioners
v.
Abortion Rights Mobilization, Inc., et al.

Docketed:

September 11, 1987 Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Baine, Kevin T.

Counsel for respondent: Solicitor General, Beil, Marshall

Entry	Date	Note	Proceedings and Orders
1	Sep 11 1987	G	Petition for writ of certiorari filed.
2	Sep 11 1987		Appendix of petitioner U.S. Catholic Conf., et al. filed.
3	Oct 1 1987		Brief of respondent United States in support of petition filed.
6	Oct 7 1987		Order extending time to file response to petition until October 22, 1987.
7	Oct 22 1987	G	Motion of National Council of Churches of Christ in the U.S.A., et al. for leave to file a brief as amici curiae filed.
8	Oct 22 1987		Brief of respondents Abortion Rights Mobilization, et al. in opposition filed.
9	Oct 28 1987		DISTRIBUTED. November 13, 1987
10	Oct 30 1987	X	Reply brief of petitioners U.S. Catholic Conference, et al. filed.
12	Nov 20 1987		REDISTRIBUTED. November 25, 1987
14	Nov 30 1987		REDISTRIBUTED. December 4, 1987
15	Dec 7 1987		Motion of National Council of Churches of Christ in the U.S.A., et al. for leave to file a brief as amici curiae GRANTED.
16	Dec 7 1987		Petition GRANTED. *****
18	Jan 14 1988		Order extending time to file brief of petitioner on the merits until January 28, 1988.
23	Jan 25 1988		Brief amici curiae of Rutherford Institute, et al. filed.
19	Jan 27 1988		Brief amicus curiae of Christian Legal Society filed.
20	Jan 28 1988		Joint appendix filed.
21	Jan 28 1988		Brief of petitioners U.S. Catholic Conf., et al. filed.
22	Jan 28 1988		Brief of respondent United States filed.
24	Jan 28 1988		Brief amici curiae of Natl. Council of Churches of Christ in the U.S.A., et al. filed.
26	Feb 10 1988	G	Motion of the Solicitor General for divided argument filed.
25	Feb 11 1988	*	Record filed. Certified original record and proceedings received. (Box).
27	Feb 22 1988		Motion of the Solicitor General for divided argument GRANTED.
28	Mar 11 1988		Brief amicus curiae of National Association of Laity filed.
29	Mar 11 1988		Brief amici curiae of ACLU Foundation, et al. filed.
30	Mar 11 1988		Brief amici curiae of National Abortion Rights Action League, et al. filed.

Entry	Date	Note	Proceedings and Orders
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31	Mar 11 1988	Brief of respondents filed.	
32	Mar 11 1988	SET FOR ARGUMENT, Monday, April 18, 1988. (1st case).	
33	Mar 25 1988	CIRCULATED.	
34	Apr 5 1988	X Reply brief of petitioners U.S. Catholic Conference, et al. filed.	
35	Apr 18 1988	ARGUED.	

87-416 (1)

No. _____

Supreme Court, U.S.
FILED

SEP 11 1987

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE

and

NATIONAL CONFERENCE OF CATHOLIC BISHOPS,

Petitioners,

v.

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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QUESTIONS PRESENTED

The United States Catholic Conference ("USCC") and the National Conference of Catholic Bishops ("NCCB") received subpoenas in a suit brought by respondents Abortion Rights Mobilization, *et al.*, to force the Internal Revenue Service to revoke the tax-exempt status of various entities affiliated with the Roman Catholic Church. The district court held USCC/NCCB in civil contempt for declining to produce internal Church documents pursuant to the subpoenas and imposed fines totaling \$100,000 per day for each day the documents were not produced. A divided panel of the court of appeals affirmed.

Questions presented are:

(1) Whether the court of appeals disregarded controlling precedent from this Court by ruling that petitioners, non-party witnesses subject to a final judgment of civil contempt, cannot raise the absence of an Article III case or controversy in challenging the court's constitutional power to issue and enforce process.

(2) Whether private parties have Article III standing to compel the Internal Revenue Service to exercise its discretion to investigate complaints of impermissible political campaign activity by, and to revoke the tax-exempt status of, numerous religious organizations.

PARTIES TO THE PROCEEDING

Lawrence Lader, Margaret O. Strahl, M.D., Helen W. Edey, M.D., Ruth P. Smith, National Women's Health Network, Inc., Long Island National Organization for Women-Nassau, Inc., Rabbi Israel Margolies, Reverend Bea Blair, Rabbi Balfour Brickner, Reverend Robert Hare, Reverend Marvin G. Lutz, Women's Center for Reproductive Health, Jennie Rose Lifrieri, Eileen Walsh, Patricia Sullivan Luciano, Marcella Michalski, Chris Niebrzydowski, Judith A. Seibel, Karen DeCrow and Susan Sherer are also plaintiffs in the district court and respondents here. Secretary of the Treasury James A. Baker, III, and Commissioner of Internal Revenue Lawrence B. Gibbs are defendants in the district court and respondents here.

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UNITED STATES CATHOLIC CONFERENCE

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ABORTION RIGHTS MOBILIZATION, INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The United States Catholic Conference and National Conference of Catholic Bishops petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (A. 1a-43a) is reported at 824 F.2d 156. The May 8, 1986 opinion of the district court holding petitioners in civil contempt (A. 44a-51a) is reported at 110 F.R.D. 337. The May 9, 1986 order of the district court amending its contempt citation (A. 52a-53a) is unreported. Earlier opinions of the district court denying the motions to dismiss (A. 54a-92a; 93a-102a) are reported at 603 F. Supp. 970 and 544 F. Supp. 471, respectively.

JURISDICTION

The opinion of the court of appeals affirming the district court's contempt citation was entered on June 4, 1987. A timely petition for rehearing, with suggestion for rehearing *en banc*, was denied on July 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, section 2 of the Constitution provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

Petitioners United States Catholic Conference and National Conference of Catholic Bishops ("USCC/NCCB") challenge a final judgment of civil contempt for refusing to produce documents pursuant to subpoenas *duces tecum* in *Abortion Rights Mobilization v. Baker*, No. 80 Civ. 5990 (S.D.N.Y.). That case is a suit by respondents, Abortion Rights Mobilization, *et al.* ("ARM"), against the Secretary of the Treasury and the Commissioner of Internal Revenue, seeking an order requiring the government to revoke the tax exemptions of thousands of Catholic Church organizations for engaging in pro-life activi-

ties allegedly inconsistent with the political activity restrictions of Internal Revenue Code § 501(c)(3).¹ USCC and NCCB are distinct organizations with identical memberships. Each is composed of all active Roman Catholic bishops in the United States. Since 1946, petitioner USCC has been the recipient of an annual group exemption letter, exempting under § 501(c)(3) USCC, NCCB and approximately 28,000 Catholic Church entities in the United States.

The district court held petitioners in civil contempt for refusing to surrender the subpoenaed church documents and imposed a \$100,000 daily sanction for the failure to produce. A divided panel of the Court of Appeals for the Second Circuit affirmed, holding that petitioners lacked standing to challenge the district court's Article III power to hold them in contempt.

1. The Complaint

The amended complaint in *ARM v. Baker* was filed on behalf of nine organizations and twenty private individuals. Three of the groups are tax-exempt organizations that advocate the continuation of legalized abortion. The remaining six are health clinics that perform abortions. Five individual plaintiffs are clergymen who allege that they voluntarily have refrained from participating in political campaigns. The clergymen contend that the government's alleged nonenforcement of § 501(c)(3) against Catholic Church entities violates the Establishment Clause. They do not allege any enforcement, or threatened enforcement, of the code against them personally, or against their churches. The remaining individual plain-

¹ I.R.C. § 501(c)(3) exempts from federal income taxation those entities "organized and operated exclusively for religious, charitable, . . . or educational purposes, . . . which [do] not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

tiffs are described primarily as voters.² They claim an impairment of their right to vote due to the "distortion of the political process" said to result from uneven enforcement of § 501(c)(3). The plaintiffs also named as defendants USCC/NCCB.

The complaint alleges that various Catholic Church entities have supported or opposed political candidates to advance their belief that unborn life is human and must be protected. It contends that a policy statement, called the Pastoral Plan for Pro-life Activities, adopted by the NCCB in 1975, is the "blueprint for the Church's illegal activities."³ The complaint then alleges "upon information and belief [that] Roman Catholic priests and other Church officials have actively and systematically participated in political campaigns in all parts of the country" It cites six examples over a ten-year period, including the fact that "[a]t least one Church has distributed 'right to life' leaflets with the Church bulletin." The complaint seeks an injunction ordering the government to (1) revoke the tax-exempt status of Catholic Church entities; (2) assess and collect all back taxes resulting from the revocation of the Church's tax-exempt status; and (3) notify the Church's contributors that they may not take charitable tax deductions for their contributions.

2. The Motions to Dismiss

The government and USCC/NCCB moved to dismiss the complaint on several grounds, including lack of standing. On July 19, 1982, the district court granted the mo-

² Assorted other bases for standing were rejected by the district court.

³ The 1975 Pastoral Plan had as its goal reversing the decline in "respect for human life in our society" by "activat[ing] the pastoral resources of the Church in three major efforts: (1) an educational/public information effort . . . (2) a pastoral effort . . . [and] (3) a public policy effort."

tions in part and denied them in part. *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982) ("ARM I") A. 54a-92a.⁴ The court dismissed claims against USCC/NCCB,⁵ but held that all plaintiffs (except five clinics) had standing to sue the government. The court found that the clergy plaintiffs had standing directly under the Establishment Clause, since they "have devoted their lives to religious communities and beliefs that are denigrated by government favoritism to a different theology." A. 67a-68a. For similar reasons, one clinic, the Women's Center for Reproductive Health, affiliated with a clergy plaintiff, also had "Establishment Clause standing."

The court further found that all the other individual plaintiffs and three advocacy organizations had standing as voters. This was so, the court said, because the plaintiffs were injured by "a system in which members of the public have greater incentive to donate funds to the Roman Catholic Church than to politically active abortion rights groups and in which each dollar contributed to the church is worth more than one given to non-exempt organizations." A. 73a. The court believed that conclusion also satisfied the causation and redressability requirements of standing, since the "defendants' tax policy is the source of the distortion in the political process that plaintiffs complain of" and "[a]n injunction against that discriminatory policy will restore the proper balance between adversaries in the abortion debate." *Id.* The district court denied the government's motion to certify the question of standing for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *Abortion Rights Mobiliza-*

⁴ "A." refers to the Appendix to this Petition. The Appendix, because of its length, has been printed separately.

⁵ The court held that USCC/NCCB were incapable of violating the Establishment Clause, and had a right to rely on the tax exemption as issued by the IRS. See ARM I, A. 83a-84a.

tion, Inc. v. Regan, 552 F. Supp. 364 (S.D.N.Y. 1982) ("ARM II").

3. The Subpoenas

In March 1983, ARM served subpoenas *duces tecum* on USCC/NCCB. The subpoenas demanded sixteen types of documents in five broad categories: (1) all drafts of the Pastoral Plan for Pro-life Activities, as well as the minutes of the bishops' discussions of its proposed contents, and all documents relating to its implementation; (2) all documents reflecting contact with any candidates for public office anywhere in the United States; (3) all documents reflecting financial support or "involvement" of USCC/NCCB, "or any state Catholic conference, archdiocese, diocese, or parish church," or any "church personnel" (defined to include every employee of each of those organizations), with twelve national and state pro-life organizations; (4) petitioners' tax or information returns and "without limitation, all correspondence, memoranda or other communications relating to the consideration or approval by the Internal Revenue Service" of any application for § 501(c)(3) status; and (5) the identities of the president and executive secretary of the Catholic conferences in sixteen states and the identities of the archbishops or bishops and directors of pro-life activities in eighteen dioceses for the years 1975 to the present.⁶

On April 14, 1983, USCC/NCCB moved to quash the subpoenas, arguing, *inter alia*,⁷ that the court lacked Article III jurisdiction. The district court summarily denied the motion on April 4, 1984. The court likewise

⁶ This last request is presumably a prelude to planned depositions. Such a list could include more than 160 people—including 55 chairmen or executive secretaries (25 of whom are bishops or archbishops), 18 other bishops or archbishops and 47 auxiliary bishops.

⁷ Petitioners also argued that the subpoenas were unduly burdensome and overbroad.

denied the government's motion to stay all proceedings in the case pending this Court's decision in *Allen v. Wright*, 468 U.S. 737 (1984).

On July 3, 1984, this Court held in *Allen* that parents of black public school children lacked standing to sue the Secretary of the Treasury and the Commissioner of Internal Revenue for failing to revoke the tax-exempt status of discriminatory private schools. *Allen* held that the principle of the separation of powers precluded such suits based on claims that the government had failed properly to enforce the law. 468 U.S. at 759-61.

In light of that decision, the government renewed its motion to dismiss the complaint for lack of standing. On March 1, 1985, the district court denied the motion. The court held that *Allen* was distinguishable and refused to modify its earlier decision. *Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. 970 (S.D.N.Y. 1985) ("ARM III") A. 93a-102a. The district court again denied the government's motion to certify the standing question for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

4. Contempt Proceedings

On June 20, 1985, after the government's renewed motion to dismiss was denied, ARM moved to hold USCC/NCCB in contempt. USCC/NCCB cross-petitioned for a protective order, arguing that the subpoenas raised serious First Amendment issues that should not be faced while there remained serious doubt about the district court's jurisdiction. On September 5, 1985, the court denied ARM's motion for contempt, but ordered USCC/NCCB to begin production of documents "forthwith."⁸

⁸ However, the district court ordered ARM to "narrow" two portions of the subpoenas requesting internal church documents relating to discussions about political candidates and the Pastoral Plan.

Following the court's order, USCC/NCCB requested that ARM agree to a protective order governing use of the documents. Respondents refused and filed a renewed motion for contempt. During the pendency of that motion, the government filed a petition for a writ of prohibition or mandamus in the court of appeals. Because the court of appeals had requested a response from plaintiffs, the district court denied plaintiffs' motion for contempt and stayed compliance with the subpoenas pending the court of appeals' final disposition of the government's petition. The court of appeals summarily denied the petition on January 14, 1986. *In re Baker*, 788 F.2d 3 (2d Cir. 1986) (table).

After the court of appeals' denial of mandamus, respondents once again renewed their motion to hold USCC/NCCB in contempt. On February 26, 1986, the district court denied the renewed motion, but ordered USCC/NCCB to begin production of documents on March 7, 1986. On March 6, 1986, USCC/NCCB delivered to the district judge a letter explaining that they could not, in conscience, produce the subpoenaed records because of their substantial doubt as to the court's jurisdiction. ARM then renewed its motion to hold USCC/NCCB in contempt; USCC/NCCB responded with affidavits detailing the reasons for their refusal to comply with the subpoenas.

On May 8, 1986, the district court granted ARM's motion, holding petitioners in civil contempt of court and imposing a fine of \$50,000 per day against each organization for each day the documents were not produced. *Abortion Rights Mobilization, Inc. v. Baker*, 110 F.R.D. 337 (S.D.N.Y. 1986) A. 44a-51a. The sanctions, however, have been stayed throughout the course of the appellate proceedings. See 52a-53a, 105a-107a, 108a-111a.

5. Petitioners' Appeal

Petitioners appealed, arguing that the district court lacked Article III jurisdiction and was therefore without

constitutional power to issue and enforce its subpoenas. On June 4, 1987, a divided panel of the court of appeals affirmed.⁹ In what it styled as a case of first impression, the majority framed "the threshold issue" as "whether the witnesses have standing to challenge their contempt adjudication on the ground that the District Court lacks subject matter jurisdiction over the lawsuit in which they had been obliged to produce evidence." *In re United States Catholic Conference, et al.*, 824 F.2d 156 (2d Cir. 1987), A. 1a, 8a. Relying principally on *Blair v. United States*, 250 U.S. 273 (1919), the majority held that "[w]ith respect to jurisdiction over the underlying action . . . the witness may make only the limited challenge as to whether there exists a *colorable basis for exercising subject matter jurisdiction*, and not a full-scale challenge to the correctness of the District Court's exercise of such jurisdiction." A. 10a (emphasis added).

USCC/NCCB relied, in part, on this Court's holding in *Bender v. Williamsport Area School Dist.*, — U.S. —, 106 S. Ct. 1326 (1986), that every appellate court has an obligation to consider *sua sponte* the jurisdiction of the lower court. The court of appeals brushed aside the reliance on *Bender*, stating that standing is simply a question of "subject matter jurisdiction," and that "[a] lack of subject matter jurisdiction does not disable the district court from exercising all judicial power." A. 12a. For support, the majority cited the familiar rule that a court has jurisdiction to determine its own jurisdiction. *Id.* The majority, in declining to follow *Bender*, stated that it was not reviewing "a final judgment in the underlying suit," A. 16a, and that it was "inquiring only whether the District Court had *sufficient jurisdiction* to enable it to adjudicate the witnesses in civil contempt." A. 16a-17a (emphasis added). The

⁹ Judge Newman wrote the opinion of the court. He was joined by Judge Kearse, who filed a concurring opinion. Judge Cardamone dissented.

majority concluded that petitioners could "challenge their contempt adjudication only on the limited ground that the District Court lacks even colorable jurisdiction over the underlying lawsuit." A. 18a.¹⁰

Judge Cardamone dissented,¹¹ emphasizing that exercises of judicial power by Article III courts in civil cases must derive from the constitutional grant to hear cases and controversies. A. 21a-22a. Judge Cardamone stressed this Court's statement in *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950), that "[t]he judicial subpoena power . . . is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution," A. 24a. He distinguished *Blair* on the basis that "the Grand Jury . . . does not depend on a case or controversy for power to get evidence . . ." *Id.*, quoting *Morton Salt*, 338 U.S. at 642 (emphasis omitted). Judge Cardamone thus recognized that "both traditional constitutional principles and case law make clear the District Court's power to issue discovery and civil contempt sanctions derives from and is limited by its power over the lawsuit." A. 27a. Consequently, he reasoned that petitioners had standing to challenge the existence of a case or controversy in the district court. Indeed, quoting *Bender*, 106 S.Ct. at 1331, Judge Cardamone stressed that "[w]holly apart from the witnesses' standing, we have an independent and affirmative duty to review the lower court's authority." A. 30a.

¹⁰ In two paragraphs, the court then found that "colorable jurisdiction" existed. A. 19a-20a.

¹¹ Judge Kearse filed a brief concurring opinion. It, too, treated standing as an "ingredient" of "subject matter jurisdiction." A. 42a. It concluded that the court's jurisdiction to determine jurisdiction must include the ability to compel evidence designed to establish standing, *id.*, despite the fact that the subpoenas in question do not relate to that issue. See description of subpoenas at p. 6, *supra*.

REASONS FOR GRANTING THE WRIT

I. The refusal of the court of appeals to determine plaintiffs' Article III standing conflicts with decisions of this Court and with the text of the Constitution.

An unbroken line of decisions by this Court establishes the fundamental principle that the jurisdiction of federal courts is limited by the provisions of Article III of the Constitution. Article III requires that plaintiffs in federal court have standing to maintain their claims. Absent Article III standing, there is no case or controversy, and a federal court is without constitutional power to act. The majority opinion of the divided court of appeals disregarded this central constitutional principle by affirming a final judgment of civil contempt but refusing to examine whether the district court had the requisite Article III power to act upon the plaintiffs' complaint and enforce their discovery requests.

In affirming the contempt judgment against USCC/NCCB, the court of appeals created a new rule of law by holding that a district court need not have full Article III power, but only "colorable jurisdiction," A. 18a, to enforce civil subpoenas and impose severe contempt sanctions. This new rule squarely conflicts with the decisions of this Court on three important principles of law: (1) that a witness adjudicated in civil contempt has the right to full appellate review of the contempt order, *United States v. Ryan*, 402 U.S. 530 (1971); (2) that "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction but also that of the lower courts in a cause under review,'" *Bender v. Williamsport Area School Dist.*, — U.S. —, 106 S. Ct. 1326, 1331 (1986); and (3) that the power of the district court to issue and enforce process derives from and is dependent upon the existence of an Article III case or controversy, *United States v. United Mine Workers*, 330 U.S. 258 (1947). The necessary effect of this new rule is to exempt from Article III

limitations all discovery directed to non-parties in civil litigation.

1. The majority conceded that USCC/NCCB "unquestionably" have the right to appeal the district court's contempt order. A. 8a. According to this Court's established precedent, that right includes the ability to "obtain full review of his claims before undertaking any burden of compliance with the subpoena." *United States v. Ryan*, 402 U.S. at 533; see also *Cobbledick v. United States*, 309 U.S. 323, 328 (1940). As to the witness, the district court's order is final and failure to consider the constitutional claims now renders the witness "powerless to avert the mischief" of the subpoena. *Cobbledick v. United States*, 309 U.S. at 327, quoting *Perlman v. United States*, 247 U.S. 7, 12 (1918). Witnesses held in contempt have the right to appellate review because of the real injuries that can flow from compelled compliance with subpoenas *duces tecum*.¹² See discussion at p. 18, *infra*.

Having paid lip service to a contemnor's right to appeal, the court of appeals proceeded to emasculate it "by so narrow a view of what an appellate court may review [that it] effectively deprives these contemnors of any meaningful appeal." A. 33a (Diss.). The decision below places a new limitation on the right of a witness to challenge the validity of contempt orders—a limitation that is inconsistent with the right of full review

¹² In *Maness v. Meyers*, 419 U.S. 449 (1975), this Court recognized that, when a trial court orders a witness to reveal information, "[c]ompliance could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released. Subsequent appellate vindication does not necessarily have its ordinary consequence of totally repairing the error." *Id.* at 460. In this case, subsequent appellate review, if it should ever be sought by a party after a final judgment, provides USCC/NCCB (and any future witness confronted with a similar situation) no relief at all.

recognized by this Court. This narrow view of the appellate rights of witnesses is particularly disturbing and especially inappropriate where, as here, it involves what this Court has repeatedly stated is the threshold question posed to any federal court—whether, pursuant to Article III of the Constitution, the court has power to act at all.

2. The court of appeals' decision is in open conflict with *Bender v. Williamsport Area School Dist.* and the cases on which it is based. It has long been the law that, whether raised by a party, a witness or the court itself, the constitutional power of the lower court to act is always properly at issue on appeal. This Court recently reiterated in *Bender*, 106 S. Ct. at 1331, that this requirement derives from the Constitution itself: "Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto."

Because this limitation derives from the Constitution, "[o]n every writ of error or appeal, the first and fundamental question is that of jurisdiction This question the court is bound to ask and answer for itself, even when not otherwise suggested, and *without respect to the relation of the parties to it.*" *Id.* at 1334 (emphasis added); accord, *Juidice v. Vail*, 430 U.S. 327, 331-32 (1977); *United States v. Corrick*, 298 U.S. 435, 440 (1936); *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). This obligation also extends to the prudential considerations that underlie the standing doctrine. *Hodel v. Irving*, — U.S. —, 107 S.Ct. 2076, 2081 (1987). Even where the district or appellate court makes no mention of the standing issue, "if the record discloses that the lower court was without jurisdiction this court will notice the defect" and will maintain jurisdiction "not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *United States v. Corrick*, 298 U.S. at 440.

3. The majority opinion is also at war with this Court's opinion in *United States v. United Mine Workers*, 330 U.S. 258 (1947), which expressly held that a civil contempt order cannot survive a finding that the court issuing the order was without subject matter jurisdiction. In *United Mine Workers*, this Court repeatedly stated that the obligation to obey court orders is appropriate only when the "subject matter of the suit [is] . . . properly before the court." *Id.* at 294. Indeed, *United Mine Workers* specifically held that a civil contempt order—such as the one involved in this appeal—is subject to reversal for lack of subject matter jurisdiction:

It does not follow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order. The right to remedial relief falls with an injunction which events prove was erroneously issued, and *a fortiori* when the injunction or restraining order was beyond the jurisdiction of the court.

Id. at 294-95.¹³

The principle that a civil contempt order can only be imposed by a court with subject matter jurisdiction applies with special force where the basis for the contempt is failure to obey a discovery subpoena. In *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), this Court

¹³ Unlike criminal contempt, civil contempt does not attempt to vindicate the authority of a court. *United Mine Workers*, 330 U.S. at 302. The purpose of civil contempt is to coerce compliance with court orders for the benefit of a party and the ongoing proceedings. Thus, it is particularly appropriate that, when the party seeking to invoke the process of the court has no right to be in court, the party not "profit" from the witness' refusal to obey an invalid subpoena.

explained the constitutional limitations on the power of a federal court to issue subpoenas:

Federal judicial power itself extends only to adjudication of cases and controversies The judicial subpoena power not only is subject to specific constitutional limitations . . . but also it is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution.

Id. at 641-42.¹⁴

The majority's holding that a court without power under Article III can hold a witness in civil contempt and impose draconian sanctions to coerce compliance with a discovery subpoena so long as it has "colorable" authority disregards this Court's teachings in *United Mine Workers* and *Morton Salt*. The ruling effectively exempts civil discovery orders from the limitations of Article III. Such a rule cannot be reconciled with this Court's consistent rulings that the ability to litigate in the federal courts depends upon the existence of a legitimate case or controversy. As succinctly stated by now Chief Justice Rehnquist in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464,

¹⁴ The court of appeals responded to *Morton Salt* by stating that constitutional limitations on the court's power apply to "discovery directed at a party that is resisted on the ground that the court lacks subject matter jurisdiction over the lawsuit involving the party," but not to discovery directed to a non-party witness. A. 17a. But the majority offered no principled basis for distinguishing between parties and witnesses concerning the constitutional limitation discussed in *Morton Salt*, and there is none. Article III limitations do not vary according to the identity or status of litigants contesting those limitations. Article III states limits on the power of the courts, not the parties. Thus, parties cannot consent to jurisdiction nor can they be estopped from raising the issue by virtue of their own conduct. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 377 n.21 (1978); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951).

475-76 (1982), (*Valley Forge*), "of one thing we may be sure: Those who do not possess Article III standing may not litigate as suitors in the courts of the United States."

4. The court of appeals' "colorable jurisdiction" exception to the rule that federal courts must have Article III power to conduct litigation stands alone, unsupported by any precedent. The majority below noted that "[a] lack of subject matter jurisdiction does not disable a district court from exercising all judicial power." A. 12a. But the three narrowly tailored and well-established situations in which a federal court may enforce orders, even if it later turns out jurisdiction is lacking, are not exceptions to Article III, as the majority seemed to believe. Rather they are necessities inherent in the principle that courts must decide their own power under the Constitution. A court always has the power to order discovery to determine its own jurisdiction; to issue injunctions to preserve the status quo pending its decision on that issue; and to enforce such injunctions through criminal contempt. *United Mine Workers*, 330 U.S. at 291-93; see also *United States v. Shipp*, 203 U.S. 563, 573 (1906). It follows that a court has the power to punish for violations of such orders to insure that the ability to determine jurisdiction can be exercised—to avoid "the paradox of lacking power to decide its power." A. 37a (Diss.) (footnote omitted).

The subpoenas in this case have nothing to do with aiding the court in determining its jurisdiction. Neither the court below nor the plaintiffs have ever urged that this discovery is necessary to aid the court in determining plaintiffs' standing. They are "ordinary" subpoenas to aid a civil litigant in proving the merits of its case.¹⁵

¹⁵ Thus, the point made by the concurring opinion that, in some cases, discovery may be necessary to determine a plaintiff's Article III standing is true, but irrelevant.

The majority's "colorable jurisdiction" rule has no basis in the settled law of this Court, and serves only to justify its departure from Article III limitations.

5. Much of the majority opinion below is based on an unprecedented expansion of this Court's decision in *Blair v. United States*, 250 U.S. 273 (1919). *Blair* held that a witness could not challenge a grand jury subpoena by attacking the constitutionality of the statute alleged to have been violated. Based on the statement that a witness "is not interested to challenge the jurisdiction of court or grand jury over the subject-matter that is under inquiry," A. 99a (emphasis in majority opinion), quoting *Blair*, 250 U.S. at 279, the court of appeals found in *Blair* a rule of "wider application" never discovered by any other court in the nearly seventy years since that decision.

There is no discussion whatever in *Blair* of the significance of Article III's limitation on federal courts to hear cases or controversies. The focus in *Blair* was on the extraordinary investigative power of the grand jury. Unlike a court in a civil case, a grand jury "does not depend on a case or controversy for power to get evidence, but can investigate merely on a suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Powell*, 379 U.S. 48, 57 (1964). Subsequent cases have carefully distinguished the power of the grand jury from the more limited authority of Article III courts that "depend on a case or controversy for power to get evidence." *United States v. Bisceglia*, 420 U.S. 141, 148 (1975); A. 35a n.3 (Diss.) (citing cases). Since it was decided in 1919, not a single reported decision has held that *Blair* disabled an appellate court from examining the Article III power of the district court issuing civil process. The majority puts weight on *Blair* that the opinion in that case simply cannot support.

6. Drawing upon its expanded interpretation of *Blair*, the court of appeals held that USCC/NCCB may not challenge the Article III power of the court below to issue the subpoenas because that question was not "personal" to those witnesses. A. 18a. That statement is remarkable when applied to any witness subject to the subpoena power of the federal courts, but particularly so here where the subject matter of the lawsuit is the continuing tax exemption of the subpoenaed witness.

Although the federal officials are the named defendants, the targets of the lawsuit are the religious organizations. ARM's discovery in the case has to date been directed almost exclusively at USCC/NCCB. The challenged subpoenas seek access to internal church discussions regarding the formulation and implementation of the bishops' position on abortion, as represented by the Pastoral Plan; any contact with any candidate for public office in the United States by any official of the Church; the financial relationship between Catholic institutions and various pro-life organizations; and communications between USCC/NCCB and the IRS.

This case involves a challenge to the tax-exempt status of USCC/NCCB and more than 28,000 separate Catholic organizations within the umbrella group ruling obtained by USCC. The court of appeals reached the anomalous conclusion that USCC/NCCB had an "insufficient interest" in challenging subpoenas directed to attacking their tax-exempt status—a subject about which no one else could possibly have a greater interest. At the same time, the court of appeals found that a coalition of pro-abortion rights activists had sufficient interest to challenge USCC/NCCB's tax exemptions—a subject in which they have no legal interest at all. If the majority opinion is allowed to stand, it will condemn subpoenaed witnesses who are the targets of lawsuits to watch from the sidelines without ever having the opportunity to challenge the constitutionality of the subpoenas.

II. Under this Court's controlling precedent, plaintiffs lack Article III standing to maintain this action and take discovery.

The decisions below that plaintiffs have standing to challenge the IRS's decision regarding the tax status of a third party are in direct conflict with this Court's decision in *Allen v. Wright*, 468 U.S. 737 (1984). If left unreviewed,¹⁶ the decisions below not only will permit this case to go forward challenging the tax status of the entities comprising the Catholic Church, but also will encourage other discontented opponents of religious or other tax-exempt organizations to press their policy positions through lawsuits challenging the IRS's administration of the tax code. "Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication." *Allen*, 468 U.S. at 759-60. The Article III question presented here is thus worthy of review not only because the decision below is wrong, but also because it creates an opening for the disruption of the orderly administration of the tax laws and the harassment of religious and other exempt organizations by politically motivated opponents using the process of the federal courts.¹⁷

¹⁶ This Court may consider the merits of the Article III standing question even though the court of appeals did not. See *Bender*, 106 S.Ct. at 1331; *United States v. Corrick*, 298 U.S. at 440. The question presented is purely one of law and the issues have been fully fleshed out by the two decisions of the district court. A. 54a-92a; 93a-102a.

¹⁷ See, e.g., *American Society of Travel Agents, Inc. v. Blumenthal*, 573 F.2d 145 (D.C. Cir. 1977), cert. denied, 435 U.S. 947 (1978) (group of travel agents sued to revoke tax exempt status of American Jewish Congress for allegedly engaging in prohibited business activity); *Khalaf v. Regan*, 85-1 U.S. Tax Case ¶ 9269 (D.D.C. 1985) (Anti-zionist organizations and individuals sued to revoke tax-exemption of Jewish charitable organizations, alleging improper use of charitable contributions to support government of Israel). Both cases were dismissed based upon proper application of standing requirements.

1. In *Allen v. Wright* this Court reexamined the criteria plaintiffs must meet to establish standing under Article III of the Constitution. The facts in *Allen* are not materially distinguishable from this case, and the district court's decisions that plaintiffs here have standing are plainly inconsistent with this Court's holding in *Allen*. In ruling that plaintiffs stated "colorable jurisdiction," the court of appeals did not even cite to *Allen* and engaged in none of the analysis required by this Court to determine plaintiffs' standing.

Plaintiffs in *Allen* were a class of parents of black children who were attending public schools. They filed suit against the Secretary of the Treasury and the Commissioner of Internal Revenue challenging the guidelines and procedures for implementing the requirement that racially discriminatory schools be denied tax-exempt status. 468 U.S. at 739-40. They alleged that certain tax-exempt private schools, not parties to the action, were established in desegregated school districts to make available segregated schools with racially discriminatory policies. *Id.* Plaintiffs claimed injury from an alleged unlawful grant of tax-exempt status by the IRS.

In ruling that the *Allen* plaintiffs lacked standing, this Court recognized that "the 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." 468 U.S. at 750; *see also Valley Forge*, 454 U.S. at 473-74; *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979). In particular, "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 468 U.S. at 752. The concept of separation of powers—the principle defining the role of the courts in our federal system—prevents plaintiffs here from invoking federal court power to challenge the administration and application of the tax exemption available under section

501(c)(3) to USCC/NCCB and the many other organizations referred to collectively as the Catholic Church.

2. Allowing standing in this case would involve courts in continuing oversight of the IRS's exercise of its broad administrative discretion to monitor and act upon the continued eligibility for tax exemption of thousands of organizations. The decision in *Allen*, if it means anything, means such oversight is not a proper role for the federal courts. The salutary policy of judicial deference to the Executive Branch is particularly appropriate where, as here, the complaint is that the Executive Branch failed to act. An agency decision regarding enforcement proceedings "has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.' U.S. Const., art. II, § 3." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).¹⁸

Sensitivity to the proper role of the judiciary is especially important where, as here and in *Allen*, plaintiffs complain about application of criteria for maintaining section 501(c)(3) status.¹⁹ The political activity restric-

¹⁸ The district court failed completely to consider the administrative expertise of the IRS on the questions at issue in this case or the interference with executive discretion required to grant plaintiffs relief. The district court's conclusion that accepting jurisdiction in this and similar cases would merely involve a determination of whether the agency had properly "observed Congress' commands" is a manifest oversimplification and is fundamentally at odds with the prudential limitations set by this Court. *See ARM III, A. 101a-102a.*

¹⁹ The courts and Congress have been especially reluctant to permit interference with IRS judgments and determinations regarding application of the Code. *See National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472-77 (1979); *Bingler v. Johnson*, 394 U.S. 741 (1969); *Tax Analysts and Advocates v. Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *American Society of Travel Agents, Inc. v. Blumen-*

tion at issue in this case is only one of several imposed upon exempt organizations under the statute and regulations. Enforcement of that restriction involves myriad judgments on issues ranging from the permissible content of voter education projects by exempt organizations to what may be written in the religious press during election campaigns.²⁰ See, e.g., Revenue Ruling 78-248, 1978-1 C.B. 154; Revenue Ruling 80-282, 1980-2 C.B. 178. To allow this case to go forward would open the courthouse to plaintiffs seeking to impose their own interpretations and priorities on the agency charged with the responsibility of enforcing the Code.

This Court recently emphasized that discretionary judgments regarding enforcement actions are ill-suited to judicial review:

The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An

thal, 566 F.2d 145 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978).

²⁰ The limitations articulated by the Court in *Allen* are thus especially important in this case because the IRS may have a sensitivity to difficult First Amendment problems that individual opponents of exempt organizations and courts considering their challenges may lack. Adding another layer of review by permitting disgruntled opponents of religious organizations to bring suit challenging the IRS's judgment would seriously compound the constitutional and practical problems inherent in limiting the speech of religious organizations. See *McDaniel v. Paty*, 435 U.S. 618, 640 (1978) (Brennan, J., concurring); *Walz v. Tax Commission*, 397 U.S. 664, 670 (1970).

agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Heckler v. Chaney, 470 U.S. at 831-32.²¹ Where, as here, plaintiffs challenge not an agency's interpretation of the law, but rather its decision whether to initiate enforcement proceedings against a third party, courts are not empowered to second-guess the agency's discretionary judgment and force a different allocation of resources. *Id.*; see *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). The district court's decisions ignore this allocation of power to the Executive Branch and permit private plaintiffs and the courts to become super regulators, questioning the decisions of the IRS with respect to third-party taxpayers.

3. Plaintiffs here, as in *Allen*, fail to meet the traditional three-part test of injury, causation and redressability necessary to maintain an action consistent with Article III requirements. *Allen v. Wright*, 468 U.S. at 751; *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44-46 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975).

The district court held that certain plaintiffs had standing under the Establishment Clause because their "religiously inspired mission is denigrated by government endorsement of a theology contrary to [their] guiding principles." *ARM I*, A. 68a. But, as this Court expressly held in *Allen*, plaintiffs must show a direct personal harm flowing from the alleged illegal conduct. Stigmatic in-

²¹ *Heckler v. Chaney* involved not constitutional standing but the reviewability of an agency's decision under the Administrative Procedure Act, 5 U.S.C. § 701. Nevertheless, the Court's decision on the appropriate role of the federal courts in reviewing agency enforcement decisions is equally applicable to the prudential limitations at issue in this case.

jury, or denigration of one's belief that comes from alleged illegal government conduct, is not enough.

If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school. All such persons could claim the same sort of abstract stigmatic injury respondents assert in their first claim of injury. A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine. Recognition of standing in such circumstances would transform the federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States v. SCRAP*, 412 U.S. 669, 687 (1973). Constitutional limits on the role of the federal courts preclude such a transformation.

Allen, 468 U.S. at 755-56 (footnote omitted). See also *Valley Forge*, 454 U.S. at 489-90. It is just such a role that the district court has permitted the plaintiffs to assume in this case. A minister in New York is challenging the government's grant of a tax exemption to the Archdiocese of San Antonio, Texas. A women's organization in Long Island is contesting the government's alleged failure to monitor the activity of a parish priest in South Dakota. There is no limiting principle in the district court's opinion that recognizes the properly defined role of federal courts demanded by this Court in *Allen*.

4. This Court in *Simon* and again in *Allen* unequivocally stated that where plaintiffs challenge the tax status of a third party, standing analysis is deficient absent a focus on the conduct of the tax-exempt organization. *Simon*, 426 U.S. at 44-46; *Allen*, 468 U.S. at 757 n.22. The district court granted certain plaintiffs standing under the rubric of "voter standing," based upon their claimed injury as campaign contributors because their

donations are alleged to be worth less than tax-deductible donations to church-related entities. *ARM I*, A. 73a; *ARM III*, A. 98a-99a. It did so without examining whether the government conduct was responsible for the claimed injury or whether the conduct of the third party taxpayers would be affected by the requested relief. But, as this Court held in *Allen*, even if the complaint states a cognizable injury, it cannot "support standing because the injury alleged is not fairly traceable to the Government conduct . . . challenge[d] as unlawful." *Allen*, 468 U.S. at 757. The flaw in the plaintiffs' argument in both *Allen* and this case is that, although they "claim indifference as to the course the [tax-exempt organization] would take," *id.* at 749, the ability to redress any claimed injury, beyond the mere complaint about government violation of the law, depends entirely on the response of the third-party taxpayer.

The failure of the courts below to recognize this fundamental aspect of standing analysis is demonstrated by the absence of any discussion of the impact of a favorable decision on plaintiffs' claimed injury. The plaintiffs' only alleged injury is that the claimed prohibited activity of the church disadvantages them in the political arena. The district court concluded that plaintiffs' "injury"²² could be redressed by placing church entities on an "equal footing" in the political arena by taking away their tax exemptions. *ARM III*, A. 99a. But, if this

²² Although plaintiffs continue to refer to themselves as "voters," they allege nothing in this case that remotely affects their right to vote. Unlike parties in true voter standing cases, plaintiffs here do not complain of any governmental action that restricts their right to vote for certain candidates, see *O'Hair v. White*, 675 F.2d 680 (5th Cir. 1982), makes their vote less significant when compared with others, see *Baker v. Carr*, 369 U.S. 186, 208 (1962), or makes the voice of their representative less significant than others, *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir.), cert. denied, 464 U.S. 823 (1983). Thus, they do not state any voter injury.

remedy has no effect on the exempt organization's participation in the political process, plaintiffs will merely *feel* better because the taxpayer has been punished by a withdrawal of its tax exemption. Their position in the political arena vis-a-vis Catholic Church entities will be unchanged. Thus, the redressability of plaintiffs' complaint of injury in the political process, no matter how they touch it, is dependent on whether a withdrawal of the tax exemption of church entities would lead them and their contributors to alter their conduct. *Allen*, 468 U.S. at 758; *Simon*, 426 U.S. at 42-46.

The speculation required here to find a causal link between defendants' failure to revoke the exempt status of USCC/NCCB and the competitive disadvantage the plaintiffs complain they experience in the political arena is far more attenuated than in *Simon* or *Allen*. In *Simon*, several indigents and organizations of indigents sued to challenge a revenue ruling under section 501(c)(3) that they claimed encouraged hospitals to offer fewer services to indigents. This Court held, as a matter of law, that "[i]t is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." *Id.* at 42-43. Moreover, "[i]t is equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services." *Id.* at 43. This Court undertook a similar analysis in dismissing plaintiffs' claim in *Allen* and held that it was "entirely speculative" whether withdrawal of the tax exemption of racially discriminatory schools would have any impact on the ability of respondents' children to receive a desegregated education. 468 U.S. at 758.

Here, the plaintiffs attribute their alleged competitive disadvantage to how unknown potential contributors to religious organizations will respond to the religious or-

ganizations' loss of their tax exemptions. The district court must have assumed that (i) such contributors necessarily donate their money to exempt Catholic entities to obtain tax benefits, (ii) such donations will necessarily decrease if the exemption is removed, and (iii) the church entities would therefore spend less money in promoting their view that abortion is immoral and should be against the law. Such facile assumptions ignore the myriad actors and the myriad motives that influence contributors' decisions whether to donate money and exempt organizations' decisions how to spend it. The district court's ruling eschewed the discrete causation analysis required by *Simon* and *Allen* and produced a ruling based on the "unadorned speculation" rejected by this Court. *Simon*, 426 U.S. at 44.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

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87-416 (2)

Supreme Court, U.S.
FILED

No. _____

SEP 11 1987

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE
and
NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
v. *Petitioners,*
ABORTION RIGHTS MOBILIZATION, INC., *et al.,*
Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1486—August Term, 1985

(Argued: June 25, 1986 Decided: June 4, 1987)

Docket No. 86-6092

IN RE UNITED STATES CATHOLIC CONFERENCE and
NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Appellants,

ABORTION RIGHTS MOBILIZATION, INC., LAWRENCE LADER,
MARGARET O. STRAHL, M.D., HELEN W. EDEY, M.D.,
RUTH P. SMITH, NATIONAL WOMENS HEALTH NET-
WORK, INC., LONG ISLAND NATIONAL ORGANIZATION FOR
WOMEN-NASSAU, INC., RABBI ISRAEL MARGOLIES, REV-
EREND BEA BLAIR, RABBI BALFOUR BRICKNER, REV-
EREND ROBERT HARE, REVEREND MARVIN G. LUTZ,
WOMENS CENTER FOR REPRODUCTIVE HEALTH, JENNIE
ROSE LIFRIERI, EILEEN WALSH, PATRICIA SULLIVAN
LUCIANO, MARCELLA MICHALSKI, CHRIS NIEBRZYDOW-
SKI, JUDITH A. SEIBEL, KAREN DECROW and SUSAN
SHERER,

Plaintiffs-Appellees,

— v. —

JAMES A. BAKER, III, Secretary of the Treasury,
and ROSCOE L. EGGER, JR.,
Commissioner of Internal Revenue,
Defendants.

Before:

NEWMAN, KEARSE, and CARDAMONE,
Circuit Judges.*

Appeal from a judgment of the District Court for the Southern District of New York (Robert L. Carter, Judge) holding witnesses in civil contempt; witnesses attempt to challenge the District Court's subject matter jurisdiction over the lawsuit in which they have been compelled to furnish evidence.

Affirmed. Judge Kearse concurs with a separate opinion. Judge Cardamone dissents with a separate opinion.

Wilfred R. Caron, Gen. Counsel, United States Catholic Conference, Wash., D.C. (Charles H. Wilson, Richard S. Hoffman, Williams & Connolly, Wash., D.C.; Mark E. Chopko, Asst. Gen. Counsel, U.S. Catholic Conference, Wash. D.C.; Joseph B. Valentine, Hughes Hubbard & Reed, New York, N.Y., on the brief), for appellants.

Marshall Beil, New York, N.Y., for plaintiffs-appellees.

Gerald T. Ford, Asst. U.S. Atty., New York, N.Y. (Rudolph W. Giuliani, U.S. Atty., Jane E. Booth and Steven E. Obus, Asst. U.S. Attys., New York, N.Y., on the brief), for defendants.

(Prof. Edward McGlynn Gaffney, Jr., Loyola Law School, Los Angeles, Cal., and Michael J. Woodruff, Samuel E. Ericson, Kimberlee Wood Colby, Merrifield, Va., filed a brief on behalf of National Council of Churches of Christ in the U.S.A., et al., as amici curiae.)

* Judge Mansfield, originally a member of the panel, died on January 7, 1987. Judge Kearse has been appointed to the panel pursuant to Local Rule § 0.14(b).

JON O. NEWMAN, *Circuit Judge*:

This appeal from an adjudication of civil contempt presents the interesting and apparently novel question whether a non-party witness has standing on appeal to challenge a district court's subject matter jurisdiction over the lawsuit in which the witness has been compelled to furnish evidence. The issue arises on an appeal by the United States Catholic Conference ("USCC") and the National Conference of Catholic Bishops ("NCCB") (collectively "the witnesses") from orders of the District Court for the Southern District of New York (Robert L. Carter, Judge) entered May 8 and 9, 1986. The witnesses were held in civil contempt and subjected to coercive daily fines for their refusal to comply with discovery orders entered in a lawsuit brought to challenge the federal tax-exempt status of the Roman Catholic Church in the United States. The lawsuit has been brought by various organizations and individuals who contend, among other things, that they are injured by the Government's permitting the Catholic Church to retain its tax-exempt status while engaging in political activities that the plaintiffs contend violate the limitations imposed by section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3) (1982). The witnesses challenge the contempt adjudication solely on the ground that the plaintiffs lack standing to bring the lawsuit. Without making any definitive ruling on the standing of the *plaintiffs*, we conclude that the *witnesses* have standing to question only whether the District Court has a colorable basis for exercising subject matter jurisdiction, that such colorable basis exists, and that in the absence of any challenge to the discovery orders that implicate personal rights of the witnesses, the orders adjudicating them in civil contempt should be affirmed.

I.

The plaintiffs are nine organizations and twenty individuals, all of whom act in one or more capacities to

support the constitutional right of women to choose an abortion. Three of the organizations are active in advocating the right to an abortion. Six of the organizations are health clinics that perform abortions. The individuals include persons identified as officers of or contributors to the advocacy organizations, a physician who performs abortions, clergymen whose religious tenets hold it permissible for women to choose an abortion, and Roman Catholics who contribute to the Roman Catholic Church but oppose the Church's position on abortion. All of the individual plaintiffs are voters and taxpayers. The complaint named as defendants the Secretary of the Treasury and the Commissioner of Internal Revenue ("the federal defendants"), and the USCC and the NCCB, alleged in the complaint to be "the two principal national organizations of the Roman Catholic Church in the United States."

The complaint recites the language of section 501(c)(3) of the Internal Revenue Code, defining a tax-exempt organization as one

which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

26 U.S.C. § 501(c)(3). The complaint alleges that this prohibition on political activity by tax-exempt organizations is constitutionally required with respect to religious organizations by the First Amendment. The plaintiffs then allege various activities undertaken by the Roman Catholic Church that are claimed to constitute "interven[tion] in political campaigns to further [the Church's] religious belief that no one should be able to obtain an abortion in the United States." These activities, undertaken without loss of the Church's tax-exempt status, are alleged to have injured the plaintiffs in various ways. The primary injury allegedly sustained is that the plaintiffs are disadvantaged in the political arena with respect

to political activity on behalf of pro-abortion or pro-choice candidates because the plaintiffs abide by the political action prohibition of section 501(c)(3) while the Church allegedly does not. Some of the plaintiffs also allege that they are injured as taxpayers on the theory that a tax exemption for a religious organization engaging in political activity constitutes a government expenditure to establish a religion and injured as voters on the theory that the toleration of political activity by the Church while plaintiffs limit their activity in observance of section 501(c)(3) has diminished plaintiffs' right to vote.

The complaint alleges five causes of action. The first claims that the activities of the Roman Catholic Church violate section 501(c)(3) and the First Amendment. The remaining four allege that the failure of the federal defendants to revoke the tax-exempt status of the Catholic Church violate their duties under the Code and various provisions of the Constitution.

All four of the original defendants moved to dismiss on various grounds, including the plaintiffs' lack of standing and failure to state a claim. On July 19, 1982, the District Court granted the motion by the USCC and the NCCB to dismiss Count One for failure to state a claim. *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471, 487 (S.D.N.Y. 1982). Since this was the only count alleging a cause of action against the two Catholic organizations, that ruling removed them from the case as defendants. The Court denied the motion by the federal defendants, concluding that, except for five health service clinics, all other plaintiffs had standing to sue. The District Judge also denied a motion by the federal defendants to certify his ruling denying their motion to dismiss for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *Abortion Rights Mobilization, Inc. v. Regan*, 552 F. Supp. 364 (S.D.N.Y. 1982).

In early 1983, both the plaintiffs and the federal defendants served deposition subpoenas duces tecum on the USCC and the NCCB. The plaintiffs' subpoenas, which were received by the witnesses' counsel on March 2, 1983, have given rise to the pending appeal. These subpoenas seek various documents concerning allegedly political activities engaged in by the USCC and the NCCB, including records of financial support of political candidates and organizations. On April 4, 1984, the District Court denied a motion to quash the plaintiffs' subpoenas. No production of documents occurred, the witnesses apparently anticipating that their obligation to comply might be removed by an anticipated decision of the Supreme Court in litigation concerning the standing of parents of Negro children to challenge the tax-exempt status of racially segregated private schools. *See Allen v. Wright*, 468 U.S. 737 (1984). Shortly after the Supreme Court ruled against standing in *Allen v. Wright*, *supra*, the federal defendants renewed their motion to dismiss. The District Court denied that motion on March 1, 1985, *Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. 970 (S.D.N.Y. 1985), and subsequently denied certification for interlocutory appeal under section 1292(b).

On June 18, 1985, the plaintiffs sought enforcement of their subpoenas by moving for an order holding the witnesses in contempt. In subsequent pretrial conferences, the District Court questioned whether two paragraphs of the subpoenas, those calling for production of minutes of internal church meetings, might encounter First Amendment objections. In an order on September 4, 1985, Judge Carter ruled that documents called for by these two paragraphs need not be produced "at this time," and that these requests should be narrowed. At the same time he ordered the witnesses to comply "forthwith" with all other requests of the subpoenas and denied the plaintiffs' motion for contempt, without prejudice to renewal in the event of noncompliance. Thereafter, the plaintiffs withdrew the two questioned paragraphs of their sub-

poenas and also agreed with the witnesses to the entry of a confidentiality order.

Compliance was delayed pending the outcome of a mandamus petition to this Court, challenging Judge Carter's denial of the federal defendants' renewed motion to dismiss. This Court denied the mandamus petition on January 14, 1986, in an unreported order. *In re Baker*, No. 85-3056 (2d Cir. Jan. 14, 1986). On February 26, 1986, Judge Carter denied plaintiffs' renewed motion to hold the witnesses in contempt, again without prejudice to renewal. However, he directed the witnesses to comply with the subpoenas by March 7, 1986, unless this Court in the interim granted rehearing of the ruling denying mandamus. This Court denied rehearing on March 3, 1986. Thereafter plaintiffs renewed their motion to hold the witnesses in contempt.

On May 8, 1986, Judge Carter issued the ruling that is the subject of this appeal. *Abortion Rights Mobilization, Inc. v. Baker*, 110 F.R.D. 337 (S.D.N.Y. 1986). Noting the prolonged period during which the witnesses had refused to comply with the subpoenas, a period then extending more than three years, Judge Carter expressed the view that the witnesses had "wilfully misled the court and the plaintiffs and made a travesty of the court process." *Id.* at 337. The District Court ruled that the witnesses were in civil contempt for refusing to comply with the February 26, 1986, order of the Court requiring document production. Judge Carter imposed a daily fine of \$50,000 commencing May 12, 1986, until the witnesses complied. On May 9, 1986, Judge Carter amended his May 8 ruling to entitle the plaintiffs to attorney's fees with respect to designated aspects of the pretrial proceedings, with the amount of fees to be determined after disposition of this appeal. He also stayed the May 8 order until May 16, 1986. This Court subsequently continued that stay pending disposition of this appeal.

Discussion

A witness adjudicated in civil contempt for failure to comply with discovery orders unquestionably has a right to appeal from the contempt order, notwithstanding the lack of a final judgment in the underlying lawsuit in which discovery was sought. *E.g.*, *In re Manufacturers Trading Corp.*, 194 F.2d 948 (6th Cir. 1952); *Fenton v. Walling*, 139 F.2d 608 (9th Cir.), *cert. denied*, 321 U.S. 798 (1944); see *Alexander v. United States*, 201 U.S. 117, 122 (1906); see generally 9 *Moore's Federal Practice* ¶ 110.13[4] at 167 (1986 & Supp. 1986-87). In this respect a witness has appellate rights superior to those of a party. A party held in civil contempt in the course of a civil lawsuit may not obtain review of the contempt order prior to an appeal from a final judgment in the underlying lawsuit. *International Business Machines Corp. v. United States*, 493 F.2d 112, 117-19 (2d Cir.), *cert. denied*, 416 U.S. 995 (1974).

In challenging their adjudication of civil contempt, the USCC and the NCCB make no claim whatever concerning the substance of either the orders requiring them to comply with the subpoenas duces tecum or the order holding them in contempt for noncompliance. The only claim made on this appeal is that the District Court lacks subject matter jurisdiction of the plaintiffs' suit against the federal defendants; in urging that jurisdiction is lacking, the witnesses, supported by the federal defendants, argue that the plaintiffs lack standing. Thus, the threshold issue we confront is whether the witnesses have standing to challenge their contempt adjudication on the ground that the District Court lacks subject matter jurisdiction over the lawsuit in which they have been obliged to produce evidence.¹ The issue appears to be one

¹ We need not decide whether the rule of *International Business Machines Corp. v. United States*, *supra*, would bar a party's interlocutory challenge to a civil contempt adjudication on the ground of lack of subject matter jurisdiction over the underlying lawsuit.

of first impression, at least in the context of civil litigation.

The most pertinent authority is the decision of the Supreme Court in *Blair v. United States*, 250 U.S. 273 (1919). In that case three witnesses were subpoenaed in Michigan to testify and produce records before a federal grand jury in the Southern District of New York. The grand jury was investigating possible violations of federal election laws in connection with a primary to select a candidate for United States Senator from Michigan. The witnesses appeared but refused to testify. They contended that the federal election laws were unconstitutional to the extent that they were sought to be applied to primary elections and that "because of the invalidity of these statutes, neither the United States district court nor the federal grand jury has jurisdiction to inquire into primary elections or to indict or try any person for an offense based upon the statutes. . . ." *Id.* at 278-79. The witnesses were adjudicated in civil contempt and held in custody until they complied with the subpoenas.

The Supreme Court affirmed the denial of writs of habeas corpus. The Court declined to consider the jurisdictional objections sought to be raised by the witnesses, stating that a witness "is *not interested* to challenge the jurisdiction of court or grand jury over the subject-matter that is under inquiry." *Id.* at 279 (emphasis added). Qualifying this statement slightly, the Court said that a witness "is not entitled to challenge the authority of the court or of the grand jury, provided they have a *de facto* existence and organization." *Id.* at 282. See *In re Maury Santiago*, 533 F.2d 727, 730 (1st Cir. 1976).

A party entitled to appeal an interlocutory ruling may challenge the subject matter jurisdiction of the district court over the lawsuit in which the ruling was made, see *Delta Coal Program v. Libman*, 743 F.2d 852, 854 (11th Cir. 1984) (appeal of order permitting substitu-

tion of plaintiffs); *San Filippo v. United Brotherhood of Carpenters & Joiners*, 525 F.2d 508, 513 (2d Cir. 1975) (appeal of preliminary injunction). *But cf. Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1158 (7th Cir. 1984) (in banc) (party held in criminal contempt for failure to produce required discovery may not challenge on appeal from contempt adjudication a *res judicata* ruling that would defeat the underlying lawsuit), *rev'd on other grounds*, 470 U.S. 373 (1985). However, *Blair* stands for the proposition that a witness has more limited standing. Though the contempt adjudication of the witness is final and hence appealable, that appeal brings up for review only issues in which the witness is legally "interested," *Blair v. United States*, *supra*. Doubtless, these would include any issue that concerns the witness personally, such as the district court's personal jurisdiction over the witness, *see United States v. Thompson*, 319 F.2d 665, 668 (2d Cir. 1963), or any privilege the witness may have to resist divulging the information sought, *see Hickman v. Taylor*, 153 F.2d 212, 214 (3d Cir. 1945) (in banc), *aff'd*, 392 U.S. 495 (1947). With respect to jurisdiction over the underlying action, however, *Blair* instructs that the witness may make only the limited challenge as to whether there exists a colorable basis for exercising subject matter jurisdiction, and not a full-scale challenge to the correctness of the district court's exercise of such jurisdiction.

The federal defendants contend that *Blair* should be limited to the context of a grand jury witness. They view *Blair* as merely an example of the Court's philosophy that "encouragement of delay is fatal to the vindication of the criminal law," *Cobbledick v. United States*, 309 U.S. 323, 325 (1940). It is true that *Blair* discusses the traditionally broad scope of a grand jury's authority, 250 U.S. at 282-83. But we think the decision was intended to state a rule of wider application. The Court's opinion surveys a range of statutes imposing a general

obligation on witnesses in all proceedings to give testimony, subject only to constitutional and other privileges. *Id.* at 280-81. Explicit reference is made to witnesses in civil cases. *Id.* at 280. From this review the Court concludes, "In all of these provisions, as in the general law upon the subject, it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned" *Id.* at 281 (emphasis added). After this discussion the Court states as a rule that a witness "is not entitled to challenge the authority of the court or of the grand jury provided they have a *de facto* existence and organization." *Id.* at 282 (emphasis added). If the Supreme Court in *Blair* had intended to rely on the broad scope of a grand jury's investigative authority rather than the narrow scope of a witness's permissible challenge to subject matter jurisdiction, one would have expected the Court to entertain the witness's jurisdictional challenge and summarily reject it on its merits. Instead, the Court upheld the contempt adjudication, not because the questions asked of the witness were found to be within the grand jury's far-ranging authority, but because the witness had no standing to complain that subject matter jurisdiction had been exceeded.

Moreover, the federal defendants take a somewhat inconsistent position in urging us to limit *Blair* to grand jury witnesses because of the strong policy of avoiding delay in criminal cases. Expanding their argument that the witnesses in this civil case have standing to challenge the subject matter jurisdiction of the District Court in the underlying lawsuit, the federal defendants contend that a witness in a criminal trial could make a similar challenge to a contempt adjudication for failure to testify. Letter from Assistant United States Attorney Gerald T. Ford to Clerk of Court (June 26, 1986). We agree that a witness's standing to challenge subject

matter jurisdiction in an underlying lawsuit should not depend on whether that suit is civil or criminal, but we think that such standing is unavailable regardless of the nature of the proceeding to which the witness is called.

Furthermore, we note the interesting citation of *Blair* by the Supreme Court in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), a case principally relied on by the witnesses and the federal defendants in support of their challenge to the subject matter jurisdiction of the District Court. In ruling against standing to challenge a governmental donation of property alleged to violate the Establishment Clause, the Court noted that it had regularly “‘refrain[ed] from passing upon the constitutionality of an act [of the representative branches] unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.’” *id.* at 474; the internal quotation is from *Blair v. United States*, *supra*, 250 U.S. at 279 (brackets in original; emphasis added). Apparently the Court believed that *Blair* had relevance to the civil context.

More fundamental than their effort to restrict *Blair* to the grand jury context is the contention of the witnesses and the federal defendants that the lack of subject matter jurisdiction over the underlying lawsuit impairs the power of the district court to order the witnesses to produce evidence and to adjudicate them in contempt for their refusal. If the absence of subject matter jurisdiction over the underlying suit would preclude the District Court from ordering a witness to produce evidence and effecting compliance, then we would agree that the witness would have standing to assert such a claim on appeal from an adjudication of contempt. We disagree, however, with the premise.

A lack of subject matter jurisdiction does not disable a district court from exercising all judicial power. It is

familiar ground that even a court lacking subject matter jurisdiction may conduct appropriate proceedings to determine whether it has jurisdiction and that such proceedings may include the issuance of an injunction to preserve the status quo and an adjudication of criminal contempt for violation of such an injunction. See *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 436-37 (1911); *United States v. Shipp*, 203 U.S. 563, 573 (1906). At least that is so unless the claim of subject matter jurisdiction is “frivolous and not substantial,” *United States v. United Mine Workers*, *supra*, 330 U.S. at 293, or the “court is so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities.” *id.* at 309 (Frankfurter, J., concurring).

The *Mine Workers* principle, though usually stated to apply to a court’s “jurisdiction to determine its jurisdiction,” is really an illustration of a somewhat broader point: In some circumstances the orderly processes of the courts must be observed even if it is subsequently determined by an appellate court that the trial court lacked subject matter jurisdiction. For example, a witness in a civil trial could not disrupt the courtroom and then escape the penalties of criminal contempt by successfully arguing that the court lacked subject matter jurisdiction over the suit between the civil litigants. The proper discharge of the judicial function requires that a court’s lack of power to adjudicate the rights of the primary litigants not defeat the court’s ability to command the witness to cease his disruption. Compelling a recalcitrant witness to furnish unprivileged evidence is admittedly less vital to the judicial function than maintaining courtroom order, but it is sufficiently integral to that function to justify use of such authority despite lack of jurisdiction to adjudicate rights between primary litigants.

Still, it is arguable that a court’s authority to punish courtroom disorder or witness recalcitrance with *criminal*

contempt sanctions does not authorize the imposition of civil contempt sanctions without affording the contemnor an opportunity to contest subject matter jurisdiction over the underlying suit. This argument, which seems inconsistent with the normal rule that civil contempt measures must be used before the more drastic sanctions of criminal contempt are employed, see *Shillitani v. United States*, 384 U.S. 364, 371 n.9 (1966), draws some support from the decision in *Mine Workers*. As the Court there observed,

It does not follow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order. The right to remedial relief falls with an injunction which events prove was erroneously issued . . . and *a fortiori* when the injunction or restraining order was beyond the jurisdiction of the court.

330 U.S. at 294-95 (citations and footnote omitted). That rule, however, applies to prevent one party to a lawsuit from profiting at the expense of another party in a suit over which the trial court is ultimately determined to lack subject matter jurisdiction. It does not necessarily apply to bar a plaintiff from retaining a fine imposed upon a witness as a coercive sanction to compel the furnishing of unprivileged evidence. However, we need not decide at this stage of this litigation what rights the plaintiff may ultimately have to any coercive fines the witnesses may pay. Cf. *International Business Machine Corp. v. United States*, *supra*, 493 F.2d at 119 (raising possibility that a party-contemnor might pay a civil contempt sanction and later make a claim for return of its money). Since the contempt order has been stayed, no such payments have been made, and we prefer

to believe that the witnesses will abide by any orders of the district court once the stay is terminated. We need not speculate about issues that would arise only if recalcitrance continues, coercive fines are paid, and subsequently, on appeal from a final judgment in the underlying action, subject matter jurisdiction is determined to have been lacking.

Even if the witnesses and the federal defendants were correct in urging that *Blair* decided only that a grand jury witness lacks standing to challenge subject matter jurisdiction, that decision nonetheless strongly supports our basic point that a court's lack of subject matter jurisdiction does not disable it from acting in some matters in addition to the ascertainment of its own jurisdiction. Moreover, there are important practical reasons for concluding that the compulsion of unprivileged evidence is one such matter on which the trial court should be free to act, unimpeded by interlocutory appellate inquiry into its subject matter jurisdiction over the underlying litigation. It is well settled that a party may not take an interlocutory appeal from the denial of its motion to dismiss for lack of subject matter jurisdiction. See *Catlin v. United States*, 324 U.S. 229, 233 (1945). If a recalcitrant witness had standing to challenge subject matter jurisdiction on an appeal from an adjudication of civil contempt, the way would be open for easy circumvention of this salutary rule. The defendant could effectively precipitate appellate review of a district court's ruling upholding subject matter jurisdiction by serving a discovery request on a friendly witness, who could obligingly resist solely on the ground that subject matter jurisdiction of the underlying suit was lacking. The witness would realistically be exposed only to the sanction of civil contempt,² and would be obliged to pay

² Since civil contempt would very likely secure compliance with the discovery order, it would be used prior to any use of criminal contempt. See *Shillitani v. United States*, *supra*, 384 U.S. at 371

money immediately only if the contempt order was not stayed pending appeal, normally a slight risk and one that the defendant would very likely assume. If the contempt adjudication was affirmed, the witness would promptly comply; if it was reversed for lack of subject matter jurisdiction, the suit would be dismissed. Interlocutory review of the denial of the motion to dismiss would thereby be achieved.

The authorities relied on by the witnesses and the federal defendants to permit their challenge to subject matter jurisdiction are not persuasive. *Bender v. Williamsport Area School District*, 106 S. Ct. 1326 (1986), held that a person not a party to a lawsuit could not appeal from a decision in the suit with which he disagreed. That holding does not help the witnesses who are seeking to challenge a ruling in the lawsuit between the plaintiffs and the federal defendants, to which they are not parties. In *Bender* the Court noted the traditional rule that on every appeal a court is obliged to consider the question of its own jurisdiction and that of the court from which the appeal is taken "without respect to the relation of the parties to [such question]." *Id.* at 1334 (quoting *Mansfield, Coldwater & Lake Michigan Ry. v. Swan*, 111 U.S. 379, 382 (1884)). If we were reviewing a final judgment in the underlying suit, we would of course be obliged to consider the District Court's jurisdiction to enter that judgment, whether or not any party to the suit raised the issue. But *Bender* does not determine whether an appeal from an adjudication of a witness's civil contempt obliges or even permits a reviewing court to consider the trial court's jurisdiction over the underlying lawsuit. In the pending case, we will observe the traditional rule expressed in *Bender* by inquiring only whether the District Court had sufficient jurisdic-

n.9. Cf. *Marrese v. American Academy of Orthopaedic Surgeons*, *supra*, 726 F.2d at 1158 (criminal contempt, though rarely imposed as sanction for violation of discovery order, imposed on a party).

tion to enable it to adjudicate the witnesses in civil contempt.

Marrese v. American Academy of Orthopaedic Surgeons, *supra*, involved a civil defendant held in criminal contempt for failure to obey a discovery order. The defendant resisted on the ground that the action against it was barred by *res judicata*. The Seventh Circuit agreed and ordered the suit dismissed, a ruling subsequently reversed by the Supreme Court, 470 U.S. 373 (1985). In a passage not affected by the Supreme Court's reversal, the Seventh Circuit observed that "if it turns out that [a] lawsuit should not have been pending because it was barred at the outset by *res judicata* we think it follows logically and practically that the discovery order exceeded the judge's authority." 726 F.2d at 1158. That passage may well be correct with respect to discovery directed against a party, a point we need not resolve on this appeal. It is surely correct with respect to discovery directed at a party that is resisted on the ground that the court lacks subject matter jurisdiction over the lawsuit involving the party. See *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950). We do not think it correct, however, with respect to discovery directed at a witness. However that may be, the most pertinent aspect of the Seventh Circuit decision cuts decisively against the position of the witnesses on this appeal. Judge Posner was careful to point out that the defendant-contemnor could not secure interlocutory review of the denial of its motion to dismiss on *res judicata* grounds by the simple expedient of resisting discovery and raising the *res judicata* point on appeal from an adjudication of contempt. Review of the *res judicata* ruling was not permitted in the appeal from the contempt judgment but was permitted only in the "independent appeal" resulting from the District Court's certification of its *res judicata* ruling for interlocutory review pursuant to 28 U.S.C. § 1292(b). See *Marrese v. American Academy of Orthopaedic Surgeons*, *supra*, 726 F.2d at

1158. Thus, a holding of *Marrese*, not disturbed by the Supreme Court's reversal on the merits of the *res judicata* issue, is that a defendant-contemnor appealing from a contempt adjudication for refusing to comply with discovery orders may not challenge a ruling of the trial court that, if correctly made, would end the civil suit in which the discovery was ordered.

United States v. Thompson, supra, concerned adjudication of civil contempt against an American citizen who failed to comply with a grand jury subpoena issued by the District Court for the Southern District of New York and served on the witness in the Philippines. We upheld the witness's contention that service of a grand jury subpoena abroad was not authorized by 28 U.S.C. § 1783 as it existed in 1962 when the subpoena was served. Because personal jurisdiction was not validly obtained, the witness was not obligated to comply with the subpoena, and the contempt was therefore reversed. The case stands as an instructive contrast to *United States v. Blair, supra*. Thompson was allowed to raise on appeal an issue personal to him, the lack of lawful service of process. Blair was not allowed to challenge an issue in which he was "not interested," *United States v. Blair, supra*, 250 U.S. at 279, the subject matter jurisdiction of the district court and the grand jury over the matter being investigated by the grand jury.

We conclude that the witnesses in the instant case may challenge their contempt adjudication only on the limited ground that the District Court lacks even colorable jurisdiction over the underlying lawsuit. An order of a court that is "usurping judicial forms and facilities," *Mine Workers, supra*, 330 U.S. at 309 (Frankfurter, J., concurring), need not be obeyed. But if such colorable jurisdiction exists, a witness may not challenge plaintiffs' standing in the underlying action or raise other issues that might demonstrate that the District Court has erroneously exercised subject matter jurisdiction over that

action. This distinction between an erroneous assertion of subject matter jurisdiction and a clear usurpation of judicial power has been fully developed in cases considering the availability of a collateral attack on a judgment entered after litigation of subject matter jurisdiction. See *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986) (collecting cases); *Restatement (Second) of Judgments* § 12(1) (1980). Collateral attack is available only if the assertion of subject matter jurisdiction was without colorable basis, not merely erroneous.

In the instant case, though the issue of subject matter jurisdiction over the underlying lawsuit is a substantial question, the District Court cannot be said to be usurping power in determining that subject matter jurisdiction exists. Plaintiffs' suit is more than a citizen effort to have the tax laws enforced and more than a taxpayer effort to complain of tax exemptions of others that might violate the Establishment Clause. The plaintiffs have claimed direct, personal injury arising from the fact that the federal defendants' failure to enforce the political action limitations of section 501(c)(3) has placed the plaintiffs at a competitive disadvantage with the Catholic Church in the arena of public advocacy on important public issues. That is a substantial basis on which to predicate standing.³ We need determine no more than

³ Cf. *Clarke v. Securities Industry Ass'n*, 107 S. Ct. 750, 754-59 (1987) (competitor suffers injury in fact from agency action permitting another to undertake certain activities and has standing if competitor's interest is arguably within the zone of interests protected by the statutory provision or constitutional guarantee allegedly violated, i.e., if competitor alleges "an injury that implicates the policies" of such provision or guarantee) (citing, *inter alia*, *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970)); *Baker v. Carr*, 397 U.S. 186, 206-08 (1962) (plaintiffs as voters had standing to challenge act that created "position of constitutionally unjustifiable inequality vis-a-vis [other] voters" and thereby disadvantaged and impaired plaintiffs' votes); see generally *Heckler v. Chaney*, 470 U.S. 821, 833 n.4, 838 (1985) (leaving open whether agency non-enforcement

that to conclude that the District Court had at least a colorable basis for the exercise of subject matter jurisdiction over the plaintiffs' suit.

The judgment of the District Court is affirmed.

decision would be subject to judicial review if it was "so extreme as to amount to an abdication of statutory responsibilities" or violated constitutional rights); *id.* at 839 (Brennan, J., concurring).

CARDAMONE, *Circuit Judge*, Dissenting:

The United States Catholic Conference and the National Conference of Catholic Bishops, (collectively "the witnesses"), seek to overturn a civil contempt order issued against them for their refusal to obey a discovery order. The witnesses—who are not parties to the underlying action below—maintain that the district court may not properly compel their production of over 20,000 pages of documents because it lacks subject matter jurisdiction over the underlying controversy. In response, the majority for the first time holds that a non-party witness may not successfully challenge subject matter jurisdiction, except where the district court lacks "colorable" jurisdiction over the underlying action. Its rationale appears to be that non-party witnesses have no "personal" interest in the court's authority or lack of authority to adjudicate the matter before it. The legal question is whether non-party witnesses held in civil contempt may presently challenge the subject matter jurisdiction of the district court over the underlying action. The majority says "not now". But because this challenge has no tomorrow the law holds that it must be made "now or never".

Since a federal court's power to issue discovery and civil contempt orders derives from and necessarily depends on its jurisdictional power to hear the underlying action before it, I would hold that these witnesses are entitled on this appeal to challenge the district court's subject matter jurisdiction and respectfully dissent from the majority's contrary holding.

A. The Court's Power to Issue Discovery and Contempt Orders Derives from its Subject Matter Jurisdiction Over the Underlying Action

Article III courts have jurisdiction only to hear "cases" and "controversies." U.S. Const. art. III, § 2, cl. 1; *Allen v. Wright*, 468 U.S. 737, 750 (1984). With few

exceptions, exercises of judicial power by Article III courts must derive from this constitutional grant. Actions taken in excess of those powers are null and void because actions taken without such jurisdiction are an "usurp[ation of] judicial forms and facilities", *United States v. United Mine Workers*, 330 U.S. 258, 309 (1947) (Frankfurter, J., concurring). These rules apply with equal force to civil contempt proceedings. It has been established law for over 100 years that a district court must have subject matter jurisdiction over the suit before it may issue a valid contempt order. See, e.g., *Ex parte Rowland*, 104 U.S. 604, 612 (1881). When it acts in excess of its jurisdiction, the order punishing a person for contempt is void. *Id.* at 612, 617-18; see also *In re Burrus*, 136 U.S. 586, 597 (1890); *In re Sawyer*, 124 U.S. 200, 221-22 (1888); *Ex parte Fisk*, 113 U.S. 713, 726 (1885).

The seminal decision in *United Mine Workers* demonstrates that these constitutional mandates continue to control civil contempt. In that case, the United States sued to restrain a coal strike in a mine seized earlier by the government. The district court issued a temporary restraining order to preserve the *status quo*. When the mine workers struck, they were held in contempt. Affirming the criminal contempt conviction, the Supreme Court held that district court orders must be obeyed until set aside, even when it ultimately is determined that the district court was deprived by statute of the jurisdiction necessary to issue the order. 330 U.S. at 293:

In so holding, the Court noted two important distinctions relevant to the issue before us. First, while the contempt order's validity does not depend on the ultimate constitutionality of the statute under which is issued, it must nevertheless be issued by a court with jurisdiction over the subject matter of the underlying litigation:

[W]e find impressive authority for the proposition that an order issued by a court *with jurisdiction*

over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.

Id. (footnote omitted and emphasis added). Insistence on a duty of obedience to a court order is therefore appropriate only when the "subject matter of the suit, as well as the parties, are properly before the court." *Id.* at 294.

Second, and most importantly, the Supreme Court stated that a civil contempt order—like the one on this appeal—would not survive a reversal for lack of subject matter jurisdiction:

It does not follow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order. *The right to remedial relief falls with an injunction which events prove was erroneously issued, . . . and a fortiori when the injunction or restraining order was beyond the jurisdiction of the court.*

Id. at 294-95 (emphasis added). The Supreme Court then went on to state that, despite its affirmance of the criminal contempt conviction, it would nevertheless set aside the civil contempt judgment. *Id.* at 295. Thus, this holding teaches lower courts that their power to issue a civil contempt order derives from and depends upon their subject matter jurisdiction over the underlying action. See also *In re Marc Rich & Co.*, 707 F.2d 663, 669 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983) ("A federal court's jurisdiction is not determined by its power to issue a subpoena; its power to issue a subpoena is determined by its jurisdiction.")

After *United Mine Workers*, the Supreme Court in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950),

specifically addressed the derivative nature of evidentiary subpoenas. *Morton Salt* stated that a court's ability to summon evidence is dependent on its having subject matter jurisdiction over the action before it. The Court compared the subpoena power of administrative agencies with the judicial subpoena power, and noted that "[t]he judicial subpoena power . . . is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution." *Id.* at 642. While "judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation," administrative agencies have "a power of inquisition . . . which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence" *Id.* (emphasis added). In the colorful words of Justice Jackson, "[t]he courts could not go fishing" *Id.*

A recent Seventh Circuit case forcefully illustrates the point. In *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150 (7th Cir. 1984) (en banc), *rev'd on other grounds*, 470 U.S. 373 (1985), a civil defendant was held in contempt for disobeying a discovery order. The defendant resisted the order on the ground that the underlying lawsuit was barred by *res judicata*. The Seventh Circuit agreed but was later reversed by the Supreme Court. In a holding unaffected by the reversal, the Seventh Circuit discussed the scope of review on appeal from a contempt order. It concluded that an appeal from a contempt order brings up for appellate review the validity of the discovery order.

If a party is willing to pay the price of being punished for contempt (or suffering an equivalent sanction such as dismissal of the complaint) if the validity of the order he has disobeyed is ultimately upheld, he can get immediate review of that order by appealing from the contempt judgment If the

underlying order is invalidated, the contempt judgment falls with it.

726 F.2d at 1157. Having determined that the discovery order's validity was properly before it, the Seventh Circuit then addressed whether the discovery order was invalid because the suit itself should have been barred by *res judicata* stating

[W]e believe that the discovery order does fall with the underlying suit. You cannot (with exceptions not pertinent here) get discovery in the federal courts unless you have a pending lawsuit, and if it turns out that the lawsuit should not have been pending because it was barred at the outset by *res judicata* we think it follows logically and practically that the discovery order exceeded the judge's authority.

And, as we have noted, if the order is invalid the contempt judgment must be set aside.

Id. at 1158.

Thus, under *Marrese*, plaintiffs have no right to obtain discovery unless there is a pending lawsuit. If it is determined that the lawsuit should not have been pending because the district court lacked subject matter jurisdiction, then the discovery order falls because it exceeds the district court's jurisdiction. And, if the discovery order exceeds the judge's authority, the contempt judgment for its disobedience must *a fortiori* be vacated.

The majority implicitly recognizes the derivative nature of the district court's contempt powers when it concludes that the lower court must have at least "colorable" jurisdiction over the case before it may constitutionally issue binding orders. It accepts the proposition that the district court's power to issue a contempt order depends, at least in part, on its subject matter jurisdiction over the underlying action. Nevertheless, the majority rejects

the application of the derivative argument to this case on the ground that the contemnors in *United Mine Workers* and *Marrese* were parties. Instead it suggests that the rule of *United Mine Workers* "does not necessarily" apply when the contemnor is a non-party witness.

The flaw in this distinction between party and non-party contemnors is threefold. First, while the Supreme Court did state that the *plaintiff*, i.e. a party, to the action may not profit from an erroneously issued order, it did not indicate—much less hold—that the payor-contemnor must also be a party. 330 U.S. at 295. Second, the distinction seems contrary to the fundamental principle that a plaintiff's right to monetary relief "is dependent upon the outcome of the basic controversy." *Id.* at 304. A plaintiff's right to collect a fine for a civil contempt falls with the determination that the issuing court lacked subject matter jurisdiction. *Id.* at 294-95. It seems unreasonable to suggest that this rule loses force when the indicated payor-contemnor is a non-party. Finally, the distinction simply ignores the fact that disobeying and risking contempt was the only avenue available for the witnesses to obtain appellate review of the discovery order. See *United States v. Ryan*, 402 U.S. 530, 532-33 (1971); *Marrese*, 726 F.2d at 1158. In fact, the majority's reluctance to decide whether the witnesses would be entitled to a refund of any fines should subject matter jurisdiction ultimately be found lacking, reveals its own dissatisfaction with the party/non-party distinction.

The majority also raises a separate objection with respect to *Marrese's* application here. It correctly points out that the Seventh Circuit did not review the *res judicata* determination as part of its review of the appeal from the contempt judgment, but on review of an independent appeal taken pursuant to 28 U.S.C. § 1292(b). See 726 F.2d at 1158. Consequently, it views *Marrese* as prohibiting, on appeal from a contempt judg-

ment, appellate review of a trial court ruling whose determination may be dispositive of the underlying litigation.

This analysis overlooks the Seventh Circuit's rationale. That court correctly noted that no one can obtain appellate review of the merits of his contention without waiting for a final judgment to be entered or an interlocutory appeal to be certified under § 1292(b). *Id.* Since the contemnor in *Marrese* was a *party*—who could raise the *res judicata* issue on an appeal from a final judgment in the underlying action—the court did not want to allow the defendant to circumvent the final judgment rule by obtaining a substantive review of his claim on appeal from the contempt judgment. Thus, the court was careful to point out that it was reviewing the *res judicata* issue on the certified appeal only. *Id.*

Yet, unlike the contemnor in *Marrese*, the witnesses here are not parties and hence do not have the right to appeal from the ultimate judgment in the underlying lawsuit. See *Union of Professional Airmen v. Alaska Aeronautical Indus.*, 625 F.2d 881, 884 (9th Cir. 1980). Thus, allowing these witnesses to obtain immediate appellate review does not subvert the final judgment rule since any claims they have must be asserted now—on appeal from their contempt sanction—or be forever lost. In short, the majority's discussion of *Marrese* ignores its own admission that "a witness has appellate rights superior to those of a party."

To summarize, both traditional constitutional principles and case law make clear that a district court's power to issue discovery and civil contempt sanctions derives from and is limited by its power over the lawsuit. If subject matter jurisdiction over the action is lacking, then the district court equally lacks authority to hold these witnesses in civil contempt. With this conclusion in mind, I turn now to an analysis of the witnesses' right

to challenge the district court's subject matter jurisdiction under the standing doctrine.

B. Non-Party Witnesses Must Have Standing to Challenge the District Court's Subject Matter Jurisdiction

The first and easier part of the standing question is whether the contempt order is appealable. Non-party witnesses are entitled to appeal a contempt order without waiting for final judgment to be entered in the underlying action, *see, e.g., Ryan*, 402 U.S. at 532; *Cobbledick v. United States*, 309 U.S. 323, 327 (1940); *Alexander v. United States*, 201 U.S. 117, 121 (1906), because insofar as the witness is concerned the cause has then become personal and final as to him. *Cobbledick*, 309 U.S. at 327. A party, as distinct from the non-party witness, has no right to appeal a contempt order until final judgment is entered in the underlying lawsuit. *See IBM Corp. v. United States*, 493 F.2d 112, 115 & n.1 (2d Cir. 1973). The majority concedes that the present contempt order is a final judgment from which the witnesses may immediately appeal.

The second and more difficult question—and the focus of this appeal—is what may properly be reviewed on that appeal. The majority agrees that if “the absence of subject matter jurisdiction over the underlying suit would preclude the District Court from ordering a witness to produce evidence and effecting compliance,” then the witnesses “would have standing to assert such a claim on appeal from an adjudication of contempt.” Since a district court's civil contempt powers do depend on its underlying subject matter jurisdiction, as demonstrated above, these witnesses have standing to object to the district court's jurisdictional ruling. Despite its concession, the majority refuses to permit the witnesses to raise on appeal the only claim which, were they to succeed, would

grant them effective relief. In my view this position is plainly contrary to standing doctrine principles.

Article III requires the party invoking the court's authority to demonstrate an actual or threatened injury resulting from and fairly traceable to the alleged illegal conduct. That injury must also be likely to be redressed by the relief requested. *See Allen v. Wright*, 468 U.S. at 751; *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

Under these principles, the witnesses clearly have standing to challenge the district court's subject matter jurisdiction. They face an actual or threatened injury. As the Supreme Court recognized in *Maness v. Meyers*, 419 U.S. 449 (1975), when a trial court orders a witness to reveal information, “[c]ompliance could cause irreparable injury because appellate courts cannot always ‘unring the bell’ once the information has been released. Subsequent appellate vindication does not necessarily have its ordinary consequence of totally repairing error.” *Id.* at 460; *see also Ryan*, 402 U.S. at 532 (“Of course, if he [the potential contemnor] complies with the subpoena he will not thereafter be able to undo the substantial effort he has exerted in order to comply”); *Overby v. United States Fidelity and Guaranty Co.*, 224 F.2d 158, 162 (5th Cir. 1955) (a non-party witness “asserting a continuing right of control of, and property right in, the documents, has standing” to appeal the district court's denial of his claim of evidentiary privilege).

This injury to the witnesses also satisfies the other standing requirements. First, it occurs as a result of allegedly illegal—or in this case unconstitutional—conduct. If, as the witnesses contend, the district court issued a discovery order without having subject matter jurisdiction over the lawsuit, then the district court exceeded the jurisdictional limits of Article III. Second,

the injury is fairly traceable to the challenged action for it is the discovery order itself, the witnesses maintain, that threatens them with irreparable harm and chills their First Amendment rights. If the discovery order is upheld, but *later* determined to be beyond the district court's powers, then the witnesses will have been needlessly subjected to expensive, burdensome, and potentially prejudicial discovery. Obviously then, full and effective appellate review conducted *before* compliance must include an examination into the district court's jurisdiction.

Finally, the injury is "likely" to be redressed by a favorable decision of this Court. If we were to determine, as the witnesses urge, that the district court lacks subject matter jurisdiction over the lawsuit, then obviously the offending discovery order would be set aside. Accordingly, I would hold that the witnesses have standing on this appeal to challenge jurisdiction.

C. We have a *Sua Sponte* Duty to Review the Lower Court's Subject Matter Jurisdiction

Wholly apart from the witnesses' standing, we have an independent and affirmative duty to review the lower court's authority. As the Supreme Court has recently explained, this duty derives not from a mere procedural convenience, but from the Constitution itself.

Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. For that reason, every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review" . . .

Bender v. Williamsport Area School Dist., 106 S.Ct. 1326, 1331 (1986) (emphasis added) (quoting *Mitchell*

v. Maurer, 293 U.S. 237, 244 (1934)). The Court continued by saying that this rule which is derived "from the nature and limits of the judicial power of the United States, is inflexible and without exception." *Id.* at 1334 (quoting *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). And significantly it further stated that: "On every writ of error or appeal, the first and fundamental question is that of jurisdiction . . . of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and *without respect to the relation of the parties to it.*" *Id.* (emphasis added) (quoting *Mansfield*, 111 U.S. at 382). See also *In re Appointment of Independent Counsel*, 766 F.2d 70, 73 (2d Cir. 1985) ("Since the standing requirement is derived from Article III limitations on the federal court's powers, it is the threshold issue in every case.").

My colleagues admit that we are obliged to consider the district court's jurisdiction to enter a final judgment in the underlying suit, whether or not the issue is raised by a party, but fail to recognize that on this appeal there is, of course, a *final* judgment before us. See *Shuffler v. Heritage Bank*, 720 F.2d 1141 (9th Cir. 1983). In fact, we have not hesitated to examine *sua sponte* a district court's jurisdiction on appeal from a civil contempt order. See, e.g., *Manway Construction Co. v. Housing Authority of Hartford*, 711 F.2d 501 (2d Cir. (1983));¹ see also *Motorola, Inc. v. Computer Displays International, Inc.*, 739 F.2d 1149, 1153-54 (7th Cir. 1984); *In re Grand Jury Proceedings—Gordon, Witness*, 722 F.2d 303, 305-06 & n.1 (6th Cir. 1983), *cert. denied*, 467 U.S. 1246 (1984). Since we have a *sua sponte* duty to review the

¹ The fact that we vacated the civil contempt order in *Manway* after having found no subject matter jurisdiction further supports our conclusion that a district court's discovery and contempt powers are limited by its actual, and not just colorable, subject matter jurisdiction.

jurisdiction of the district court and since, as discussed above, the jurisdiction of the district court to issue civil contempt judgments derives from its jurisdiction in the underlying case, we have a *sua sponte* duty to decide whether the district court has jurisdiction over the underlying case.

II

The majority's holding that non-party witnesses have no standing to challenge the subject matter jurisdiction of the underlying action has several flaws. First, and most importantly, it deprives these witnesses of any opportunity to raise a claim that might entitle them to relief. Second, it relies on an unwarranted extension of a single Supreme Court precedent. Third, it dangerously expands the limited exception under which a court may take action without a case or controversy before it. Fourth, it creates an unsupportable distinction between personal and non-personal claims. Finally, it is needlessly concerned with the possibility of collusion.

A. The Majority Denies the Witness Any Opportunity for Appellate Review

The majority concedes that the witnesses' contempt fines might be returned if the underlying action is eventually dismissed for want of subject matter jurisdiction. Nevertheless, it refuses to hear this claim at the only point at which the witnesses have a right to appeal. The holding assumes that the parties or the court will raise the subject matter jurisdiction issue on appeal from the underlying action. Yet an appeal from the ultimate decision is an uncertainty. Further, even if there is an appeal, the witnesses as non-parties, would not be entitled to assert the claim during that appeal.

Even if the witnesses could be assured of appellate review at the close of the underlying action, such a delay would present the witnesses with a Hobson's choice: either comply with a discovery order they find objection-

able and thus suffer the very mischief they seek to avoid or be at risk for the enormous fines imposed by the district court. The majority blithely assumes that the witnesses must abandon their claim "prefer[ing] to believe that the witnesses will abide by any orders of the district court once the stay is terminated." But the law does not require such blind obedience. In *United States v. Ryan*, the Supreme Court stated that "respondent is free to refuse compliance and, as we have noted, in such event he may obtain *full review* of his claims *before* undertaking any burden of compliance with the subpoena." 402 U.S. at 532 (emphasis added). In *Cobbledick*, the Court noted that once a witness chooses to disobey a court order and is "committed for contempt [a]t that point the witness's situation becomes so severed from the main proceeding as to permit an appeal [N]ot to allow this interruption would forever preclude review of the witness' claim, for his alternatives are to abandon the claim or languish in jail." 309 U.S. at 328.

The relevance of *Ryan* and *Cobbledick* to the instant case is obvious. These witnesses must be allowed on this appeal to raise their only challenge to the trial court's order before being compelled to comply with its dictates. Under today's holding, being held in contempt becomes not a choice, but a certainty. Absent the opportunity for full and effective review, a right to appeal after subjecting oneself to contempt is worthless. Thus, a witness will in circumstances similar to those here refuse to hazard contempt leaving compliance as the only option. To emasculate the witnesses' right to appeal by so narrow a view of what an appellate court may review, effectively deprives these contemnors of any meaningful appeal.

Further, such a limited view of an appeal is contrary to case law. In *Cobbledick*, the Supreme Court stated that, "[d]ue regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statute." 309 U.S. at 329.

This concept was reiterated just over a month ago in *Pennsylvania v. Ritchie*, — U.S. —, 107 S. Ct. 989 (1987), when the Supreme Court said that “‘statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered.’” *Id.* at 997-98 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976)). A narrow review of the non-party witness’ claims accomplishes precisely what *Ritchie* said lower courts should attempt to avoid.

B. The Majority’s Reliance on *Blair* is Misplaced

The majority relies on *Blair v. United States*, 250 U.S. 273 (1919), as the “most pertinent authority” to resolve the issue before us. While *Blair* contains broad language suggesting that witnesses do not have standing to challenge a grand jury’s or a court’s jurisdiction, that language must be read in the context of the surrounding text. To begin, the specific holding in *Blair* is that a grand jury witness may not challenge the constitutionality of the statute under which the investigated conduct may be illegal. *Id.* at 279. This is because, as *Blair* makes clear, the jurisdiction of the grand jury is not dependent upon the constitutionality of the statutes which prohibit the conduct being investigated. Thus, a declaration that the statute in *Blair* was unconstitutional would not give the witness the relief he sought. In this respect, *Blair* represents an ordinary application of the standing doctrine inapplicable in this case. Here, unlike *Blair*, the jurisdiction of the court to issue a contempt order is derivative of its jurisdiction over the underlying action. Thus, unlike a grand jury witness these court-ordered witnesses do have an interest in the district court’s proper exercise of its authority.

Moreover, to the extent that *Blair* could be read broadly to prevent a witness-contemnor from challenging the subject matter jurisdiction of the grand jury on any

grounds, *Blair* should not be extended to the courts.² It is clear that *Blair* relied on the investigative nature of the grand jury, as distinguished from Article III courts that are limited by the Constitution to deciding cases and controversies. As *Blair* stresses, the grand jury is “a body with powers of investigation and inquisition, the scope of those inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation.” *Id.* at 282. The Supreme Court has noted this distinction when relying on *Blair* in the context of an administrative agency investigation. *See, e.g., United States v. Bisceglia*, 420 U.S. 141, 147-48 (1975) (federal agencies have “a power of inquisition” which is “more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence”).

For this reason, we have recognized the rationale of *Blair* as relying on the broad investigative powers of the grand jury. *See, e.g., United States v. Flood*, 394 F.2d 139, 141 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968). In fact, though we and other federal courts have relied on *Blair* in a great variety of grand jury and federal agency cases,³ it has never been applied as the majority

² While *Blair* refers to both the grand jury and the courts it is clear that it does so only because the grand jury issues its subpoenas in the court’s name. For that reason, any indirect attack on the court in *Blair* was a result of the direct attack on the grand jury’s investigative powers under the statute. Hence, the Supreme Court only mentioned the court’s powers to the extent that the grand jury took action in its name.

³ *See, e.g., United States v. Sells Engineering Inc.*, 463 U.S. 418, 423 (1983) (regarding disclosure of grand jury materials); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 252 n.7 (1983) (regarding grand jury testimony); *United States v. Bisceglia*, 420 U.S. 141, 147 (1975) (IRS Summons); *In re Grand Jury Matters*, 751 F.2d 13, 17 (1st Cir. 1984) (appeal involving attorney’s refusal to testify

does here. For these reasons, reliance on *Blair* in the present context is misplaced.

C. The Trouble With "Colorable"

Again relying on *Blair*, the majority determines that a non-party witness may challenge only the "colorable" jurisdiction of the lower court. There are several problems with allowing the witnesses to attack the district court's "colorable", but not "actual", subject matter jurisdiction. First, the rule from which the majority extrapolates the "colorable"/"actual" distinction was not meant to apply in this context. There are only three instances when a district court's action is *not* limited by its jurisdictional power: (1) a court has power to determine its jurisdiction; (2) that same court has power to issue an injunction to preserve the *status quo* pending

before grand jury); *In re Subpoenas to Local 478, I.U.O.E. & Benefit Funds*, 708 F.2d 65, 70-72 (2d Cir. 1983) (appeal from denial of motions challenging a special grand jury investigation); *In re President's Commission on Organized Crime Subpoena of Scarfo*, 783 F.2d 370, 372 (3d Cir. 1986) (motion to quash subpoena to appear before presidential commission); *United States v. (Under Seal)*, 714 F.2d 347, 350 n.9 (4th Cir.) (appeal from order quashing grand jury subpoena), *cert. denied*, 464 U.S. 978 (1983); *Federal Election Commission v. Lance*, 617 F.2d 365, 369 (5th Cir. 1980) (en banc) (administrative subpoena enforcement proceeding), *cert. denied*, 453 U.S. 917 (1981); *In re Grand Jury Subpoena (Battle)*, 748 F.2d 327, 330 (6th Cir. 1984) (appeal from order quashing in part grand jury subpoena); *In re Bank*, 527 F.2d 120, 125 (7th Cir. 1975) (appeal from contempt order for refusal to testify before grand jury); *In re Grand Jury Proceedings*, 473 F.2d 840, 844 (8th Cir. 1973) (appeal from contempt order for refusal to testify before grand jury); *In re Grand Jury Investigation No. 78-184*, 642 F.2d 1184, 1190 (9th Cir. 1981) (appeal from disclosure of grand jury material), *aff'd*, 463 U.S. 418 (1983); *United States v. DiBernardo*, 775 F.2d 1470, 1477 (11th Cir. 1985) (appeal from order dismissing indictment based on errors committed during grand jury proceeding), *cert. denied*, 106 S. Ct. 1948 (1986); *United States v. Coachman*, 752 F.2d 685, 691 n.34 (D.C. Cir. 1985) (appeal from contempt order for refusal to testify before grand jury).

its jurisdictional determination, see *United States v. Shipp*, 203 U.S. 563, 573 (1906) (Holmes, J.); and (3) it may enforce that injunction through criminal contempt sanctions. See *United Mine Workers*, 330 U.S. at 293. From these three precisely defined rules the majority creates out of thin air an unprecedented fourth: a court without actual subject matter jurisdiction may issue a discovery order and adjudicate a civil contempt for its violation. Why create this rule? One may search in vain the whole body of the law for a good reason.

The very existence of a court presupposes its power to entertain a controversy, if only to decide that it has no power over the particular action. Thus, a court must have "jurisdiction to determine its jurisdiction" or be faced with the paradox of lacking power to decide its power.⁴ Similarly, a court must be able to preserve the *status quo* pending its jurisdictional determination or its ultimate decision might be rendered moot. And, finally, a court must be able to enforce its authority by contempt. Without coercive power over the parties before it, a court could not dispose of cases and controversies. Justice could not be fairly administered were persons left pending adjudication free to engage in conduct that might immediately interrupt the judicial proceedings or so change the *status quo* that no effective judgment could later be rendered. The common link that ties these three exceptions together is the preservation of the court's ability to function and its authority to determine its jurisdiction.

This link is missing in the civil contempt context. For, unlike "sentences for criminal contempt [which]

⁴ The concurring opinion suggests that "jurisdiction to determine jurisdiction" may include jurisdiction to compel discovery where the jurisdictional inquiry depends on factual findings. But in most cases, including this one, such an inquiry is unnecessary because a court must accept the plaintiff's factual allegations as true when ruling on a motion to dismiss for want of standing. See *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

are punitive in their nature and [which] are imposed for the purpose of vindicating the authority of the court," *United Mine Workers*, 330 U.S. at 302, civil contempt is designed to coerce compliance for the benefit of an opposing party. *United States v. Russotti*, 746 F.2d 945, 949 (2d Cir. 1984) (civil contempt is "a remedy available only for the benefit of parties" whereas "[v]indication of the court's authority is normally accomplished by criminal contempt"); 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3917 at 616 (1976). Unlike jurisdiction, a discovery order—which the majority concedes is "less vital to the judicial function"—is for the convenience of the parties. Consequently, while a discovery order and its enforcement through civil contempt sanctions may protect the orderly process of the lawsuit relative to the parties, it does not safeguard the court's ability to function. See *Marrese*, 726 F.2d at 1158.

Nevertheless, the majority views the discovery order as "sufficiently integral" to the judicial function to justify its issuance by a court without jurisdiction. This concept seems contrary to constitutional notions of jurisdiction. For example, is not personal jurisdiction equally "sufficiently integral to the judicial function"? Then, would not a district court be justified in issuing a discovery order without "actual" personal jurisdiction over the witnesses? Yet, the majority would allow the witnesses to challenge on this appeal the district court's lack of personal jurisdiction. In light of these inconsistencies, the decision to add a new exception to the three existing exceptions seems ill-advised.

The second problem with the use of the "colorable" jurisdiction standard is that it lacks a definition. Must a district court have "*de facto* existence and organization" as those terms are used in *Blair*? See 250 U.S. at 282. Or, has the majority adopted the test of a "clear usurpation of power" used for a writ of mandamus?

If used in the latter sense, then the denial of the writ—which has already occurred in this case—would terminate review, and a subsequent appeal from contempt, as this, would be meaningless. In any event, without a clear definition, the use of the term "colorable" does not lend itself to principled analysis.

Finally, the refusal to allow a challenge to actual subject matter jurisdiction is inconsistent with the holding that the witnesses may attack the district court's "colorable" jurisdiction. If subject matter jurisdiction may be raised on appeal even a little—just to see if it is "colorable"—it is therefore a reviewable matter and the question is no longer "whether" it may be raised by the witnesses, but "how much" they may raise it. Hence, the majority's holding that our review be limited to ascertaining "colorable" jurisdiction appears untenable once it concedes that the jurisdictional issue may be raised at all.

D. The Problem with "Personal"

Again, building on *Blair*, the majority adds a further limitation on the scope of our review on this appeal by stating that the witnesses may contest only "personal" matters. It then concludes that subject matter jurisdiction over the underlying lawsuit is not "personal" to the witnesses. At the same time, it concedes that the witnesses are entitled to challenge the district court's "colorable" jurisdiction. Under this rationale, "colorable" jurisdiction must therefore be "personal" to the non-party witnesses. No explanation is offered as to why "colorable" jurisdiction is personal to the witness while "actual" jurisdiction is not.

Further, it implies that the district court's "actual" subject matter jurisdiction would be "personal" to a party, apparently based on the belief that a party is better suited to raise this claim. Yet the prerequisite for standing is that a person be among the injured, not that

such person be the most grievously or directly injured. *See Kennedy v. Sampson*, 511 F.2d 430, 435 (D.C. Cir. 1974); *see also Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (party seeking review must be "among the injured"). Moreover, like a witness, a party cannot waive, confer, or prevent a court's *sua sponte* review of subject matter jurisdiction. *See, e.g., Reale International v. Federal Republic of Nigeria*, 647 F.2d 330, 331 (2d Cir. 1981). Hence, "actual" subject matter jurisdiction is no more "personal" to a party than it is to a witness. This difficulty merely points up the number of unanswered questions left by the "personal-non-personal" distinction. For example, what is the criteria for a "personal" claim? Must a contemnor now show a threshold requirement that the grounds upon which he challenges the order affect his "personal" rather than "non-personal" interests?

E. The Majority's Fear of Collusion

The final reason for a holding adopting a narrow rule of review is the fear of collusion between a party and the non-party witness. Yet, before these fears could be realized, a party would have to overcome several obstacles. It would have to find a friendly witness to subpoena; that witness must also be willing to risk being cited for contempt with the possibility of a fine or imprisonment or to gamble that the contempt order will be stayed pending appeal. Apart from these hurdles, there are other risks that the conspirators and their attorneys would be taking that are not analyzed in the majority's account. If the other party to the lawsuit got wind of such a scheme, he could bring it to the court's attention thereby subjecting the colluders to sanctions and their attorneys to possible disbarment. *See Code of Professional Responsibility* Canon 7, EC7-25, EC7-26. In any event, weighing the risk of collusion against the loss of a non-party witness' right to a full and effective appeal, it seems preferable to me to chance the former in order to preserve the latter.

III

For all the above reasons, I dissent and vote to review on this appeal the merits of the witnesses' claim that they may not properly be held in contempt because the district court lacked subject matter jurisdiction over the underlying lawsuit between plaintiffs and the government defendants.

KEARSE, *Circuit Judge*, concurring:

I concur in Judge Newman's thorough opinion, but write separately to emphasize what I view as the narrow scope of the issue presented on this appeal and to add a reason for rejecting the appeal.

Though both the majority and dissenting opinions discuss a witness's standing to challenge the court's subject matter jurisdiction of the litigation, the question of subject matter jurisdiction may have many ingredients; this appeal involves only the ingredient of the plaintiffs' standing to bring the litigation. While certain other ingredients of subject matter jurisdiction, such as the existence of a federal question or the grant by Congress to the federal courts of the power to adjudicate a particular question, may be determined principally by legal analysis, the question of plaintiff's standing to sue often turns on his ability to make showings that are largely factual, *see, e.g., Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109-15 & nn.29, 31 (1979); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74-77 (1978); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-90 & n.15 (1973). For example, he must demonstrate that there is actual or threatened injury, that such injury is fairly traceable to defendant's illegal conduct, and that there is a substantial likelihood that such injury will be redressed by the relief requested. *See, e.g., Allen v. Wright*, 468 U.S. 737, 751 (1984). To make such largely factual showings, a plaintiff may well need, as in this case, to obtain discovery from a non-party witness.

We all agree that the court has jurisdiction, or power, to determine whether or not it has subject matter jurisdiction. One purpose of recognizing this power is to permit informed, reliable decisions on the jurisdictional issue of the plaintiff's standing. Where the needed showing as to standing is largely factual, the court must have the

power to permit the plaintiffs to conduct a reasonable amount of discovery, if necessary, to prove to the court that they do have standing. Where there is at least a colorable basis for standing, it would be unsound to allow the witnesses to abort discovery relating to standing by arguing that the plaintiffs have no actual standing.

Thus, to the extent that the discovery sought in the present case seeks information pertinent to the issue of plaintiffs' standing, this relevance provides a reason in addition to those discussed in the majority opinion for affirmance of the decision of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 5590 (RLC)

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Plaintiffs,

v.

JAMES BAKER, III, SECRETARY OF THE TREASURY,
AND ROSCOE L. EGGER, JR.,
COMMISSIONER OF INTERNAL REVENUE, *et al.*,
Defendants.

May 8, 1986

OPINION

Plaintiffs, on March 19, 1986, renewed their motion for an order adjudging the United States Catholic Conference ("USCC") and the National Conference of Catholic Bishops ("NCCB") in civil contempt. In a letter dated March 6, 1986, counsel for the USCC/NCCB stated that the "USCC/NCCB have asked me to advise the Court that they cannot, in conscience, comply with the subpoenas in question." The USCC/NCCB are unquestionably in contempt; what is at issue is their *bona fides* during this protracted discovery dispute. Plaintiffs charge the USCC/NCCB with bad faith; the latter protest their good faith and respect for the court. In the court's view the USCC/NCCB have done more than simply exercise bad judgment; they have wilfully misled the

court and the plaintiffs and have made a travesty of the court process.

The court assumes familiarity with the history of this case, which has already been the subject of three published opinions. See *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982) ("ARM I"); 552 F. Supp. 364 (S.D.N.Y. 1982) ("ARM II"); and 603 F. Supp. 970 (S.D.N.Y. 1985) ("ARM III"). Nonetheless, a recital of that history will provide an illuminating context for the facts giving rise to the instant motion. Plaintiff individuals and organizations challenge enforcement of § 501(c)(3) of the Internal Revenue Code which provides tax exempt status to charitable and educational institutions. Plaintiffs challenge the tax-exempt status of the Roman Catholic Church. They assert that the Church's lobbying and political activities against abortion render the exemption unlawful under § 501(c)(3) of the Internal Revenue Code. They also argue that the exemption violates the First Amendment to the United States Constitution. The individual plaintiffs complain because they are unable to deduct from their income contributions that they make to organizations promoting abortion, whereas taxpayers who oppose abortion can make tax-deductible contributions to the USCC and NCCB. The organizational plaintiffs complain because they are denied tax-exempt status for advocating abortion, whereas the USCC/NCCB enjoys such status and is free to engage in anti-abortion activities.

In *ARM I*, the USCC/NCCB, originally named as defendants, were dismissed on the grounds that plaintiffs had asserted no valid claim against them. The court held, however, that the plaintiffs could proceed against the Secretary of the Treasury and the Commissioner of Internal Revenue ("the government"). In addition, the court held that some, but not all, of the plaintiffs had standing to bring this action, and that the Anti-Injunction Act, 26 U.S.C. § 7421, did not bar the suit. The

government then sought certification of the latter two determinations for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and a stay of discovery. The USCC/NCCB joined in the government's certification motion and, as we noted at the time, "somewhat surprisingly, since they are no longer parties to the litigation," joined in the motion to stay discovery as well. *ARM II*, 552 F. Supp. at 366. Both motions were denied. *Id.* at 367.

Plaintiffs served subpoenas on the USCC/NCCB as third parties in March, 1983. A motion to quash the subpoenas was made in April, 1983. Subsequently, the government moved for a stay pending decision by the United States Supreme Court in *Wright v. Regan*, subsequently decided *sub nom. Allen v. Wright*, — U.S. —, 104 S.Ct. 3315 (1984). The court denied the motion because it was not as sanguine as defendants that any decision in *Wright* would alter the court's reasoning in *ARM I*. However, it suggested a schedule of discovery which would postpone the most costly discovery until the Supreme Court had spoken. Despite this ruling, the USCC/NCCB refused to produce any documents at all, and insisted that none be produced until *Wright* was decided.

After the Supreme Court decision in *Wright* the government again moved to dismiss for lack of standing. That motion was denied on March 27, 1985. *ARM III*, *supra*. The government, joined by the USCC/NCCB, again sought certification of an interlocutory appeal. That motion was denied on July 12, 1985, in an unpublished memorandum decision.

Plaintiffs had by this time reactivated their subpoenas addressed to the USCC/NCCB, which continued to refuse production. In June, 1985, the USCC/NCCB moved the court for a protective order.

On July 12, 1985, the very day on which the government's second § 1292 motion was denied, the USCC/

NCCB performed the first act of the wasteful charade that is the subject of this opinion. On that day, the court held a conference with the parties and the USCC/NCCB concerning the subpoenas and the outstanding motion for a protective order.

At this point it is appropriate to point out that litigants are free to opt for a citation of contempt if that is the only available avenue to obtain review of what they consider incorrect determinations by a lower court. Moreover, litigants may certainly take all steps to seek review short of contempt and resort to that step only as their last refuge. The court could not fault such behavior. If, at this July meeting, counsel had advised the court that the USCC/NCCB would continue to seek appellate review and that they had resolved to subject themselves to a contempt order should other means of appellate review fail, there would be no cause to complain today. But the USCC/NCCB did more than fail to be forthright with the court. They began to engage the court and the plaintiffs in a series of maneuvers that—given the USCC/NCCB's apparent intention of ultimate non-compliance—made a game of the judicial process.

At that July 12 meeting, the USCC/NCCB stated its concerns about infringement of their religious freedoms through enforcement of the subpoenas. In response, the court emphasized that it would not permit plaintiffs to engage in any broad-gauged incursion into the USCC/NCCB files, but would permit discovery only of matters demonstrably relevant to the issue before the court. The USCC/NCCB complained of wide publicity given to a document that the plaintiffs had previously received. The court censured that practice and barred plaintiffs from making public any discovery materials produced by the USCC/NCCB, since the court assumed that any documents obtained were sought solely for the purposes of litigation.

Sometime after that conference plaintiffs filed a motion for an order adjudging the USCC/NCCB in contempt because they still refused to comply with the subpoena. On September 4, 1985, the court, in an endorsement, spelled out which documents should be produced and which documents were shielded by the First Amendment. Some of the documents sought were already in the public realm, and there appeared to be no basis for withholding them. As to the religious freedom issue, the court found that documents listed in two paragraphs of the subpoena "are the only documents which could conceivably trench on First Amendment considerations," and held that those documents need not be produced at the time. Plaintiffs were ordered to narrow their requests as to those items, and both sides were asked to present their views as to whether required production of these items, even as more narrowly and precisely defined, would nonetheless violate the First Amendment. The court found the remainder of the materials unprotected and held that there remained no justification for refusing to abide by the court's order. The court refused to hold respondents in contempt but advised plaintiffs that if the unprotected documents were not produced, the motion could be renewed.

No documents were produced. In October, 1985, plaintiffs renewed their motion for an order of contempt. On October 25, 1985, the court held yet another conference to discuss the plaintiffs' motion and respondents' request for a protective order. The court painstakingly reviewed the matter with counsel. At that time a mandamus petition, filed by the government and joined by respondents, was pending before the Court of Appeals. The parties were ordered to agree on a stipulation of confidentiality and to agree on which documents would be subject to the confidentiality order. All other issues that counsel for respondents raised were discussed and, counsel asserted, resolved.

In an order dated November 20, 1985, the court recorded what had been accomplished at the conference,

supposedly resolving all objections to compliance with the subpoenas. The motion for contempt was denied, and compliance with the subpoenas was postponed until the Second Circuit's determination of the pending mandamus petition. With the exception of matter delineated in the order or new matters that might arise by virtue of the Second Circuit determination, further objections to plaintiff's subpoenas were barred.

The Second Circuit denied the mandamus petition on January 14, 1986. The USCC/NCCB continued to defy the court order. Another motion for contempt was filed on February 6, 1986. The USCC/NCCB in opposition urged the court to wait for the outcome of a petition to the Second Circuit to rehear the case *en banc*.

On February 26, 1986, the court again denied plaintiffs' motion without prejudice and ordered compliance with the subpoenas on or before March 7, 1986, unless in the interim the Second Circuit granted the petition for rehearing. On March 3, 1986, the Second Circuit denied the petition and the March 6, 1986 letter quoted above followed.

All of this effort to protect the USCC/NCCB's acknowledged interests are now shown to have been utterly, utterly futile. Had the court been told that the USCC/NCCB intended to seek appellate review by defying any subpoena, no matter how narrowly circumscribed, it could have stayed all action on the subpoenas until other avenues to bring the matter before the Second Circuit had been ventured. In the event that those avenues failed, the contempt order would have followed. We would be exactly where we are today, less the baggage of plaintiffs' assertions of bad faith and delay and the court's conclusion that plaintiffs' complaints are amply justified.

Respondents correctly note that the Second Circuit's refusal to grant the petition for mandamus gives no in-

dication of its views as to the merits of the underlying issues. Yet precedent is such that denial was all but a certainty. Mandamus is, after all, an extraordinary writ. The most efficacious route to a review by the Court of Appeals under the circumstances was by review of an adjudication of respondents in contempt. The government had no basis for using a contempt adjudication to get an appeal before the Second Circuit. The USCC/NCCB did.¹ Counsel *must* have foreseen that such was their most likely recourse. Hence, I agree with plaintiffs that the USCC/NCCB's vigorous activities up to now—seeking protective orders, holding conferences with the court and plaintiffs to discuss and agree on matters which could be subject to confidentiality protection—have been a complete waste of time and energy. The result has been to stall and frustrate plaintiffs' efforts for an early resolution of their right to obtain discovery. For that reason, sanctions for each day's delay are appropriate.

The respondents concede that they are in contempt and the facts are not in dispute. Moreover, the respondents, from the first motion for contempt filed on June 20, 1985 until now have been accorded plentiful opportunities to be heard. Therefore, no formal hearing is now required. *Parker Pen Co. v. Greenglass*, 206 F. Supp. 796 (S.D.N.Y. 1962) (Dawson, J.). Sanctions may be imposed. *Danielson v. United Seaworkers Smoked Fish & Cannery Union*, 405 F. Supp. 396, 403 (S.D.N.Y. 1975) (Carter, J.); *MCA, Inc. v. Wilson*, 425 F. Supp. 457, 459 (S.D.N.Y. 1977) (Cooper, J.). The USCC/NCCB are adjudged in contempt for refusing to comply with

¹ Apparently, what the government and USCC/NCCB would like is appellate review of the merits of this court's rulings in *ARM I* and *ARM III* prior to any trial before this court. It is questionable whether appeal of the contempt order will get the merits of the controversy before the Court of Appeals. It will, however, put in issue the validity of the subpoenas and of the court's order that the USCC/NCCB produce the requested documents.

the February 26, 1986 order of the court. Beginning May 12, 1986, for each day that the USCC/NCCB continues to defy the court's order, each will be subject to a fine of \$50,000 per day.

IT IS SO ORDERED.

Dated: New York, New York
May 8, 1986

/s/ Robert L. Carter
ROBERT CARTER
U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 5590 (RLC)

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Plaintiffs,

—v—

JAMES A. BAKER, III, Secretary of The Treasury, and
ROSCOE L. EGGER, JR., Commissioner of Internal
Revenue., *et al.*,*Defendants.*

ORDER

At a hearing in the above matter held on May 9, 1986 on an order to show cause why sanctions imposed on the United States Catholic Conference and National Conference of Catholic Bishops (USCC/NCCB) should not be stayed, and after argument,

NOW, it is

1. ORDERED, that this Court's opinion of May 8, 1986 is amended to add that it is the judgment of this Court that plaintiffs are entitled to attorneys' fees for the time spent in discovery conferences with the Court and negotiations with USCC/NCCB after the conferences concerning subpoenas and for the motion for contempt filed March 19, 1986. A petition for fees should be filed within ten days of the final disposition of the appeal of the May 8 opinion; and it is

2. FURTHER ORDERED that the application of USCC/NCCB for a stay of the imposition of the daily

finer of \$50,000 for each organization is granted and the imposition of the fines is stayed to and including May 16, 1986, with the understanding that the stay is granted to allow USCC/NCCB to perfect their appeal and that any further stay or other relief from this Court's order of May 8, 1986 must be obtained from the Court of Appeals.

Dated: May 9, 1986

/s/ Robert L. Carter
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 5990 (RLC)

ABORTION RIGHTS MOBILIZATION, INC., LAWRENCE LADER,
HAROLD W. BOSTROM, MARGARET O. STRAHL, M.D.,
HELEN W. EDEY, M.D., RUTH P. SMITH, NATIONAL
WOMEN'S HEALTH NETWORK, INC., LONG ISLAND NA-
TIONAL ORGANIZATION FOR WOMEN-NASSAU INC., RABBI
ISRAEL MARGOLIES, REVEREND BEA BLAIR, RABBI BAL-
FOUR BRICKNER, REVEREND ROBERT HARE, REVEREND
MARVIN G. LUTZ, LAUREN CLINIC, INC., MILAN M.
VUITCH, M.D., WOMEN'S CENTER FOR REPRODUCTIVE
HEALTH CENTERS, INC., HARRISBURG REPRODUCTIVE
HEALTH SERVICES, INC., HAGERSTOWN REPRODUCTIVE
HEALTH SERVICES, INC., WOMEN'S HEALTH SERVICES,
INC., JANE C. DELGADO, JENNIE ROSE LIFRIERI, EILEEN
WALSH, PATRICIA SULLIVAN LUCIANO, MARCELLA
MICHALSKI, CHRIS NIEBRZYDOWSKI, JUDITH A. SEIBEL,
KAREN DECROW, AND SUSAN SHERER,

*Plaintiffs,**v.*

DONALD T. REGAN, SECRETARY OF THE TREASURY, ROSCOE
L. EGGER, JR., COMMISSIONER OF INTERNAL REVENUE,
UNITED STATES CATHOLIC CONFERENCE, INCORPORATED,
AND NATIONAL CONFERENCE OF CATHOLIC BISHOPS,

Defendants.

July 19, 1982

OPINION

ROBERT L. CARTER, District Judge.

This is an action challenging the constitutionality of the government's enforcement of § 501(c)(3) of the Internal Revenue Code ("Code"), 26 U.S.C. § 501(c)(3) (1976). Plaintiffs are 29 individuals and organizations concerned about the right of a woman to choose to carry a fetus to term or to abort it and about the constitutionally mandated separation of church and state. The complaint names four defendants: two government officers ("government" or "federal defendants"), Donald T. Regan, the Secretary of the Treasury, and Roscoe L. Egger, Jr., the Commissioner of Internal Revenue, and the two principal national organizations of the Roman Catholic Church in the United States ("church defendants"), the United States Catholic Conference, Incorporated ("USCC"), and the National Conference of Catholic Bishops ("NCCB").

Defendants move to dismiss the action. They assert that none of the plaintiffs has the requisite standing to bring the suit, that the complaint does not state a claim upon which to grant relief, and that the court may not review the particular decisions to enforce or not to enforce § 501(c)(3) that are in dispute. In addition, the church defendants contend that they are not proper parties to this suit and that § 501(c)(3) is unconstitutional. For the reasons discussed herein, the motions to dismiss are granted in part and denied in part.

I

A. *The Plaintiffs*

The complaint names nine organizations and twenty individuals as plaintiffs. Each plaintiff (except Judith Seibel) has submitted an affidavit to augment the complaint's description of that plaintiff's particular concerns and injuries. The plaintiffs are described briefly here;

their particular grievances are discussed in greater detail *infra*.

Abortion Rights Mobilization, Inc. ("ARM") is a non-profit, tax exempt organization under § 501(c)(3) that seeks to secure and implement a women's right to a legal abortion. It is a national organization and is prohibited from engaging in political activity under the terms of its tax exemption. Contributions to ARM are tax-deductible.

Lawrence Lader is a writer, and founder and president of ARM. He has been active in the abortion rights movement and has written a number of books on the subject.

Harold W. Bostrom, Margaret O. Strahl, M.D., Helen W. Edey, M.D., and Ruth P. Smith all contribute to ARM, other abortion rights organizations and pro-choice political candidates.

National Women's Health Network, Inc. ("NWHN") is a tax-exempt membership organization of many clinics, counseling services, publishers and others who provide a wide range of services to women and attempt to influence the public to support women's rights, including the right to have an abortion. Contributions to NWHN are tax-deductible, but the organization is prohibited under § 501(c)(3) from engaging in electoral politics.

Long Island National Organization For Women ("Nassau-NOW") is a membership organization dedicated to the promotion of women's rights, including the right to have an abortion. Nassau-NOW is exempt from taxes under § 501(c)(4) of the Internal Revenue Code.

Rabbi Israel Margolies, Reverend Beatrice Blair, Rabbi Balfour Brickner, Reverend Robert Hare and Reverend Marvin G. Lutz ("clergy plaintiffs") are members of the clergy whose religious beliefs differ significantly from the Catholic Church's view of abortions. These clergy members have been active in the abortion rights movement but have not used the power of their pulpits to engage in political activities.

Laurel Clinic, Inc., Women's Center for Reproductive Health, The Federation of Feminist Women's Health Centers, Inc., Harrisburg Reproductive Health Services, Inc., Hagerstown Reproductive Health Services, Inc. and Women's Health Services, Inc. are clinics that offer to women a range of medical and other services, including abortions. The Federation of Feminist Women's Health Centers, Inc., Women's Health Services Inc. and the Women's Center for Reproductive Health are exempt from taxes under § 501(c)(3).

Milan M. Vuitch, M.D., is president of the Laurel Clinic, Inc.

Jane C. Delgado, Jennie Ross Lifrieri, Eileen Walsh, Patricia Sullivan Luciano, Marcella Michalski, Chris Niebrzydowski and Judith A. Seibel are Roman Catholics who, in keeping with their religious beliefs, contribute or have contributed to the church but who nonetheless are opposed to the church's position on abortion.

Karen DeCrow is a leader of the feminist movement and a former national president of the National Organization for Women. She was a candidate for political office in 1969 and is a potential candidate in the future.

Susan Sherer is active in the abortion rights movement.

All the individual plaintiffs are taxpayers and voters. Each of them in his or her affidavit expresses a substantial concern for the separation of church and state that is required by the establishment clause of the first amendment. Finally, plaintiff Brickner, as a private citizen, is chairman of the national issues committee of the New York State Liberal Party.

B. *The Statutory Scheme*

Section 501(c)(3) of the Code exempts from taxation groups "organized and operated exclusively for religious, charitable, . . . or educational purposes, . . . no substantial part of the activities of which is carrying on prop-

aganda, or otherwise attempting, to influence legislation . . . , and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." 26 U.S.C. § 501(c)(3) (1976). Organizations exempt from income taxation under this section in effect receive a double benefit because § 170(a), (c)(2)(B) of the Code permits an income, gift or estate tax deduction for contributions to most § 501(c)(3) entities. See 26 U.S.C. § 170 (1976). Section 501(c)(3) status, thus, is valuable to an organization because the organization can provide donors with an economic incentive to contribute to it and the organization is not taxed on the income received. Organizations exempt from taxation under other portions of § 501, by contrast, often are not entitled to receive tax-deductible contributions. See 26 U.S.C. §§ 170, 501 (1976).

To maintain the dual benefits of tax exemption and deductible contributions, a § 501(c)(3) entity must refrain from any kind of campaigning for candidates for public office. 26 U.S.C. § 170(a), (c)(2)(D) (1976); *id.* § 501(c)(3). These groups, however, are allowed to lobby as long as their attempts to influence legislation do not constitute a "substantial part" of their activities. 26 U.S.C. § 501(c)(3) (1976).

C. *The Dispute*

The Internal Revenue Service ("IRS"), annually since March 25, 1946, has ruled that "the agencies and instrumentalities and all educational, charitable, and religious institutions operated, supervised, or controlled by or in connection with the Roman Catholic Church in the United States, its territories or possessions appearing in the Official Catholic Directory . . . are entitled to exemption from Federal income tax under . . . section 501(c)(3). . . ." Exh. A to church defendants' Motion to Dismiss (Letter from T. Kern, District Director, IRS to

USCC, June 16, 1980). Defendant USCC is the recipient of the Revenue Ruling letter that certifies the church's exemption status.

Plaintiffs contend that this grant of § 501(c)(3) privileges was erroneously and illegally conferred because the church defendants are engaged in a nationwide plan to change abortion laws by, *inter alia*, lobbying and participating in partisan political campaigns on behalf of candidates supporting the Roman Catholic Church's position on abortion and in opposition to candidates with contrary views. Amended Complaint ¶¶ 21-28; *cf. McRae v. Califano*, 491 F.Supp. 630, 703-28 (E.D.N.Y.), *rev'd on other grounds sub nom. Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980) (describing some of the church's electoral and legislative activities pursuant to its "Pastoral Plan" to outlaw abortion). Despite this violation of the Code, plaintiffs allege, the government defendants have declined to apply the § 501(c)(3) prohibition against electioneering or lobbying to the church defendants and their subsidiaries. By contrast, no organization with different views on the abortion controversy has been granted tax-exempt status under 501(c)(3) while being permitted to participate in electoral politics.

Plaintiffs contend that this illegal activity has injured them in several ways. The individual plaintiffs and the members of certain of the institutional plaintiffs have been denied access to a means of contributing tax-deductible funds to promote free choice candidates. Persons with opposing views about abortion, on the other hand, can use the church to funnel donations to support candidates opposed to abortion and thereby receive a tax benefit. Those plaintiffs who have stood for office or aspire to do so on a pro-choice platform have no means of collecting tax-deductible and exempt funds for their campaign chests. Their opponents may do so. The govern-

ment defendants, it is alleged, have diminished the effectiveness of plaintiffs' political speech and their chances to prevail at the polls by enhancing the voice of plaintiffs' political adversaries.

Plaintiffs also express concern about the entanglement of church and state through the selective grant of an unrestricted tax exemption to the church defendants. The government defendants' actions are viewed by plaintiffs as selecting a favored state orthodoxy, thereby breaching the wall between church and state and denigrating religious beliefs out of government favor. In addition, plaintiffs who are religiously compelled to consider abortion as the correct response to pregnancy or who, as ministers, must counsel their congregants to do the same, express the fear that government financial support, through the Code, of the Roman Catholic Church's position on abortion will imperil the opportunity of women to obtain abortions and thereby frustrate their ability to observe their religious beliefs. Plaintiffs who are members of and contributors to the Roman Catholic Church object to their church's political use of the religiously compelled contributions.

The organizational plaintiffs complain that the government defendants have treated them differently from the church for no rational reason. In addition, those plaintiffs offering medical services to women, including abortion, assert that as a result of the church defendants' government subsidized political campaigning, restrictive abortion legislation has been enacted that has caused a decrease in plaintiffs' revenues.

Plaintiffs seek a declaration from the court that the political activities of the Roman Catholic Church and the inaction by the Secretary and the Commissioner violate the Constitution and the Code. In addition, plaintiffs request an order requiring the government defendants to take all actions necessary to enforce the Constitution and the Code, including revocation of the church defendants' § 501(c)(3) status, collection of all taxes due, and noti-

fication to church contributors that they may not deduct such contributions.

Jurisdiction is founded on 28 U.S.C. §§ 1331, 1340, 1361.

II

Defendants challenge plaintiffs' standing to bring an action concerning the tax status of third parties. Plaintiffs respond by asserting three bases for their right to proceed: establishment clause standing, voter standing, and equal protection standing.¹

A. Article III Requirements

The Supreme Court recently has had occasion to examine and clarify the rules for standing in federal courts.

"The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 72 [98

¹ Plaintiffs have withdrawn a fourth theory of standing based upon their status as taxpayers. Taxpayer standing is a narrow grant to challenge Congressional action under the taxing and spending power of Art. I, § 8 of the Constitution. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, — U.S. —, —, 102 S.Ct. 752, 762-63, 70 L.Ed.2d 700 (1982) [hereinafter cited as *Valley Forge*]; *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 228, 94 S.Ct. 2925, 2935, 41 L.Ed.2d 706 (1974); *United States v. Richardson*, 418 U.S. 166, 174-75, 94 S.Ct. 2940, 2945-2946, 41 L.Ed.2d 678 (1974).

For purposes of ruling on the standing question, the court must accept as true all material allegations in the complaint, construe the complaint in favor of the plaintiffs and similarly consider supporting affidavits. *E.g. Warth v. Seldin*, 442 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975).

S.Ct. 2620, 2629, 57 L.Ed.2d 595] (1978), quoting *Baker v. Carr*, 369 U.S. 186, 204 [82 S.Ct. 691, 703, L.Ed.2d 663] (1962). This requirement of a "personal stake" must consist of "a 'distinct and palpable injury . . . ' to the plaintiff," *Duke Power Co.*, 438 U.S. at 72 [98 S.Ct. at 2629], quoting *Warth v. Seldin*, 442 U.S. 490, 501 [95 S.Ct. 2197, 2206, 45 L.Ed.2d 343] (1975), and 'a fairly traceable' causal connection between the claimed injury and the challenged conduct," *Duke Power Co.*, 438 U.S. at 72, [98 S.Ct. at 2629], quoting *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 261 [97 S.Ct. 555, 561, 50 L.Ed.2d 450] (1977).

Larson v. Valente, — U.S. —, —, 102 S.Ct. 1673, 1680, 72 L.Ed.2d 33 (1982). In addition to demonstrating an injury that the challenged action caused, plaintiffs must show "the the exercise of the Court's remedial powers would redress the claimed injuries." *Duke Power Co. v. Carolina Env. Study Group*, *supra*, 438 U.S. at 74, 98 S.Ct. at 2630; *accord*, *Larson v. Valente*, *supra* 102 S.Ct. at 1682 n. 15; *Simon v. E. Ky. Welfare Rights Organization*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976). The Court's statements indicate that a three step inquiry should be observed in determining Article III standing: injury in fact must be ascertained, a causal link between the injury and the putatively illegal conduct must be identified, and the court must be able to provide a remedy.²

1. *Establishment Clause Standing*. The existence of Article III injury "often turns on the nature and source of the claim asserted." *Warth v. Seldin*, *supra*, 442 U.S. at 500, 95 S.Ct. at 2205. The injury in fact requirement

² Although some opinions have described the test as a two pronged one, the second "prong" seemingly contains two discrete, albeit closely related, elements; causation and redressability. For purposes of clarity, the test therefore shall be considered to analyze three separate factors.

can be satisfied by a wide range of harms, including economic, aesthetic, environmental, or spiritual damage. *See, e.g., Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 111-12, 99 S.Ct. 1601, 1613-1614, 60 L.Ed.2d 66 (1979) (denial of right to interracial association); *Duke Power Co. v. Carolina Env. Study Group*, *supra*, 438 U.S. at 73-74, 98 S.Ct. at 2629-2630 (environmental and aesthetic consequences of pollution); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686, 93 S.Ct. 2405, 2415, 37 L.Ed.2d 254 (1973) (enjoyment of natural resources); *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 208-210, 212, 83 S.Ct. 1560, 1563-1564, 1565, 10 L.Ed.2d 844 (1963) (spiritual values). There is no invariant meaning to the term "palpable injury"; the Constitution or a statute can create an interest that exists only in the legal regime, and damage to such an interest may fulfill the injury in fact requirement. *See Valley Forge*, *supra*, 102 S.Ct. at 769 (1982) (Brennan, J., dissenting); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 152, 71 S.Ct. 624, 638, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring).

Although the Supreme Court has recognized that violation of a person's "spiritual stake in the First Amendment values" of separation of church and state may inflict sufficient harm to satisfy the injury in fact test, *see Data Processing Service Organization v. Camp*, 397 U.S. 150, 154, 95 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970), *citing School Dist. of Abington Township, Pa. v. Schempp*, *supra*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844, it has cautioned that offense to one's sense of fidelity to separatist principles is an insufficient injury to bring suit for an alleged establishment clause violation. *See Valley Forge*, *supra*, 102 S.Ct. at 764-66; *Doremus v. Bd. of Education*, 342 U.S. 429, 431, 433-34, 72 S.Ct. 394, 396, 396-97, 96 L.Ed. 475 (1952). Would be plaintiffs must show that they are "directly affected by the laws and practices against which their complaints are directed."

School Dist. of Abington Township, Pa. v. Schempp, supra, 374 U.S. at 224 n.9, 83 S.Ct. at 1572 n.9.

In *Valley Forge*, the Supreme Court overturned a decision granting standing to an organization suing on behalf of its members who professed injury to their shared individuated right to non-establishment when surplus federal property was transferred to a denominational college.³ See 102 S.Ct. at 764-66. Crucial to the Supreme Court's decision was the complete lack of connection between the plaintiff and the property. Neither plaintiff nor its members alleged any physical contact with the college or its environs, and plaintiff and its members did not claim that they may have been entitled to the property if it had not been given to the college. Although the transfer affronted plaintiff's members' sense of command of the establishment clause, they could not identify any more definite and personalized connection with the objectionable transaction. See *id.* at 766. In the absence of some interest in the property, plaintiff or its members suffered no injury from the transfer.

Similarly in *Doremus v. Bd. Education*, the Court dismissed for lack of standing the complaint of taxpayers contending that a New Jersey statute requiring Bible reading at the opening of the school day violated the establishment clause. See 342 U.S. at 430, 72 S.Ct. at 395. Plaintiffs did not allege any personal, religiously inspired interest or activity that the Bible reading interfered with nor did they have any personal contact with the recitations, either through attendance or through children in attendance. See *id.* at 431, 72 S.Ct. at 396.

³ Although the *Valley Forge* plaintiffs asserted principally a claim of taxpayer standing, the Supreme Court opinion discussed at length the standards for establishment clause standing. See 102 S.Ct. at 763-67. This discussion was in direct response to the basis for finding standing that the Court of Appeals had articulated. See *id.* at 763-64.

Underlying the rejection of plaintiffs' standing in *Valley Forge* and *Doremus* is the principle that the interest of each citizen that the government be administered according to law does not confer standing because it does not create in that citizen a discrete and palpable injury. *Valley Forge, supra*, 102 S.Ct. at 764; see *Schlesinger v. Reservists Comm. to Stop the War, supra*, 418 U.S. at 216-22, 94 S.Ct. at 2929-2932 (1974). Plaintiffs asserting establishment claims, as any other plaintiffs, have "no special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Valley Forge, supra*, 102 S.Ct. at 766 (footnote omitted).⁴

The individual plaintiffs' concern about the establishment clause violations perpetrated by the defendants does not rise above the whistleblowing that the Supreme Court held, in *Valley Forge*, does not satisfy the injury requirement. Plaintiffs attempt to articulate injury in fact by linking the offending activity with their involvement in the abortion rights controversy. They describe the government action of which they complain as a subsidy to opponents of abortion that impacts on plaintiffs' particu-

⁴ The crucial standing defect in the claim of a citizen alleging governmental misconduct and nothing more is not that the alleged misconduct does not inflict harm on someone, but that the wrongdoing does not injure the plaintiff personally. Such allegations may be sufficient to make out a claim that someone has been injured; they fail to confer standing because they do not satisfy the Article III requirement that the plaintiff be among those who have suffered the injury. See *Warth v. Seldin, supra*, 422 U.S. at 502, 95 S.Ct. at 2207; *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F.Supp. 564, 568 & n.7 (D.D.C.) (three judge court), appeal dismissed, 447 U.S. 916, 100 S.Ct. 3005, 65 L.Ed.2d 1109 (1980).

This standing defect should not be confused with the prudential reason for declining to hear a case that presents a generalized grievance that is better resolved by the executive or the legislature even though the plaintiff has suffered an injury in fact and has satisfied the other Article III standing requirements. See p. 484 *infra*.

larized interest to preserve reproductive choice. Plaintiffs argue, in effect, that because they object to an establishment violation occurring in a particular arena of public controversy in which they are involved, they have suffered a discrete and palpable injury not experienced by the *Valley Forge* plaintiff. Plaintiffs' characterization of their injury shares the defect that caused the demise of the *Valley Forge* complaint. In both cases, plaintiffs described an interest that brought them to court, but they did not articulate an injury that they had suffered. Plaintiffs' devotion to the pro-choice position does not identify an interest that the allegedly illegal activities have damaged; it only explains why plaintiffs have chosen to complain about a particular government impropriety—renewal of the church defendants' § 501(c)(3) status—and not about some other wrongdoing. Plaintiffs' "special interest" in reproductive freedom is no different than the *Valley Forge* plaintiff's "special interest" in strict separation. The narrowness of the focus of litigant's concerns is not of constitutional significance as far as standing is concerned. There is no indication in the *Valley Forge* opinion that the plaintiff there would have met the injury in fact test if it single-mindedly pursued its anti-establishment goals in the field of public education only, rather than its objections to government support for any religious body or activity. See *id.* 102 S.Ct. at 765 ("standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.").⁵

⁵ Several Roman Catholic laity assert claims of injury that could be distinguishable from the claims of the public generally. These plaintiffs object to the federal defendants' standing aside while the church violates § 501(c)(3) by using funds contributed to it, including donations from the plaintiffs, to electioneer for anti-abortion candidates. Such claims might be construed to plead injury to the plaintiffs' church from non-enforcement of the Code. The establishment clause was designed not only to protect civil society from undue pressures from spiritual communities within it, but also to protect the sacred life of the population from the taint of secular politics. See *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 39-40, 53-54, 67 S.Ct. 504, 522-523, 529-530, 91 L.Ed. 711 (1947)

The organizational plaintiffs also fail to set out the injury in fact to themselves or their members that is necessary to confer standing under the establishment clause. They merely allege concern about the first amendment violations arising from the church's political activity while it enjoys § 501(c)(3) status. As did the individual plaintiffs, the organizations have explained why they are moved to bring suit to end these violations; they have not, however, explained how the violations injure them.⁶

The clergy plaintiffs and the Women's Center for Reproductive Health ("Women's Center") have disclosed, in their affidavits, compelling and personalized injuries flowing from the tacit government endorsement of the Roman Catholic Church position on abortion that are sufficient to confer standing on them to complain of the alleged established clause violations. The clergy plaintiffs

(Rutledge, J., dissenting); Memorial and Remonstrance Against Religious Assessments ¶¶ 6-8, reprinted in *id.* at 67-68, 67 S.Ct. at 536-537.

In their affidavits, however, these plaintiffs do not express concern for the pollution of their church by its forbidden entrance into the area of politics. Their expressed claims are limited to injuries to their "rights to live in a society that believes in freedom of religion." *E.g.* Delgado affidavit ¶ 5; Walsh affidavit ¶ 5. This is a generalized harm experienced as a citizen, not as a church member, and is a harm that is indistinguishable from the injury inflicted upon all citizens by executive disregard for the law. Because these plaintiffs have not complained of a distinct and palpable injury inflicted upon them as practicing Roman Catholics, they have no standing under the establishment clause.

⁶ The groups providing medical services to women arguably occupy a different position from the other institutional plaintiffs because they allege threatened or actual economic loss from the defendants' illegal activities. This injury, however, will not confer standing because the causal link between the church's tax status and these plaintiffs' lost revenues is tenuous at best. It is doubtful that the marginal increase in the coffers of the foes of abortion that is attributable to the church's tax exemption is a significant factor in legislation that has reduced the income of abortion clinics.

have devoted their lives to religious communities and beliefs that are denigrated by government favoritism to a different theology. They provide spiritual leadership to and care for the spiritual needs of their congregations. As part of these duties, they must counsel those in their care in accordance with religious laws that command consideration of abortion as the morally required response to pregnancy.⁷ The Women's Center provides guidance to women in decisionmaking on issues pertaining to family life, including childbearing. It was founded by Reverend Lutz along with others to put the principles of the Presbyterian Church into effect. As with the clergy plaintiffs, the Women's Center's religiously inspired mission is denigrated by government endorsement of a theology contrary to its guiding principles.

Tacit government endorsement of the Roman Catholic Church view of abortion hampers and frustrates these plaintiffs' ministries. The government need not silence these plaintiffs to cause discrete spiritual injury because of official approval of an orthodoxy antithetical to their spiritual mission diminishes their position in the community, encumbers their calling in life, and obstructs their ability to communicate effectively their religious message. The spiritual values protected by the establishment clause can be injured without direct coercion against individuals, see *Engel v. Vitale*, 370 U.S. 421,

⁷ The clergy plaintiffs have identified in their affidavits their respective denominations' attitudes towards pregnancy and abortion. These affidavits state that certain theologies consider compelling a woman to carry a fetus to term as repugnant as other theologies, such as the contemporary Roman Catholic Church doctrine, find abortion, see Affidavit of Rabbi Israel Margolies ¶ 3 ("To force a woman to bring an unwanted fetus into the world is a serious abridgement of the Bible . . ."), and that the availability of safe abortions may be necessary to permit a woman to fulfill her religious obligations, see Affidavit of Rev. Beatrice Blair ¶¶ 5-6 ("part of Episcopalian doctrine that women and families should be free to terminate [certain] pregnancies."); cf. *McRae v. Califano*, *supra*, 491 F.Supp. at 696-702 (discussing pro-choice theological doctrines).

430-31, 82 S.Ct. 1261, 1266-1267, 8 L.Ed.2d 601 (1962) (indirect coercive pressure to conform to officially approved doctrine), even if plaintiffs have not alleged that particular religious freedoms have been infringed, *School Dist. of Abington Township, Pa. v. Schempp*, *supra*, 374 U.S. at 224 n.9, 83 S.Ct. at 1572 n.9 (1963). It is sufficient to establish injury in fact that plaintiffs can show, as the clergy plaintiffs have, that the challenged action adversely affects them in their daily lives. See *id.*

These plaintiffs also clearly satisfy the second and third aspects of the Article III standing test—causation and redressability. Their injury flows directly from the federal defendants' allowing the church defendants the privilege of retaining § 501(c)(3) status while electioneering and denying this privilege to other religious organizations. The granting of a uniquely favored tax status to one religious entity is an unequivocal statement of preference that gilds the image of that religion and tarnishes all others. A decree ordering the termination of this illegal practice and restoring all sects to equal footing will redress this injury. Accordingly, the clergy plaintiffs and the Women's Center meet the Article III requirements for standing to raise claims under the establishment clause.

2. *Voter standing.* In *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the Supreme Court conferred "voter standing" on a group of Tennessee citizens challenging the state's apportionment scheme as "effecting a gross disproportion of representation to voting populations." *Id.* at 207, 82 S.Ct. at 704. The plaintiffs asserted that the classification disfavored the voters in some counties by "placing them in a position of unjustifiable inequality *vis-a-vis*" voters in other counties. *Id.* These allegations stated sufficient injury to satisfy the Article III standing requirements.

Baker's voter standing analysis was applied in three cases that strongly support a finding that the individual

plaintiffs⁸ and certain of the organizational plaintiffs⁹ have asserted a distinct, personal injury that confers standing. Two of the cases, like the instant action, involved challenges to the enforcement of the tax laws. All three are highly instructive.

Tax Analysts and Advocates v. Schultz, 376 F.Supp. 889 (D.D.C. 1974), involved a challenge to an IRS revenue ruling stating that gifts of up to \$3,000 to multiple finance committees organized to receive campaign con-

⁸ Plaintiffs Lader, Bostrom, Strahl, Edey, Smith, Margolies, Blair, Brickner, Hare, Lutz, Vuitch, Delgado, Lifrieri, Walsh, Luciano, Michalski, Niebrzydowski, Seibel, DeCrow, and Sherer.

⁹ None of the organizational plaintiffs can allege injury to themselves as organizations in the context of voter standing. See *Simon v. E. Ky. Welfare Rights Organization*, *supra*, 426 U.S. at 39-40, 96 S.Ct. at 1924-1925 (1976); *Fed'n for Am. Immigration Reform v. Klutznick*, *supra*, 486 F.Supp. at 569. Organizations can establish standing, however, "as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own right. *Warth v. Seldin*, *supra*, 442 U.S., at 511 [95 S.Ct., at 2211]." *Simon v. E. Ky. Welfare Rights Organization*, *supra*, 426 U.S. at 40, 96 S.Ct. at 1925; see *Common Cause v. Democratic Nat'l Comm.*, 333 F.Supp. 803, 809 & n.11 (D.D.C. 1971). National Women's Health Network, Inc., ARM and Nassau-NOW are devoted to promoting women's rights, including the right to a legal abortion. Given the political orientation of this organizational purpose, these entities have powerful claims to represent voter-members "uniquely, or even predominantly, injured" by the challenged government conduct. *Ripon Society v. Nat'l Republican Party*, 525 F.2d 567, 573 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933, 96 S.Ct. 1147, 47 L.Ed.2d 341 (1976). In any event, the organizational plaintiffs' standing will depend upon their members' satisfaction of the requirements of voter's standing, and the groups' participation in the case cannot "lessen the controversy, or blur the presentation of issues . . . in any way." *Id.* at 574.

The other organizational plaintiffs nowhere allege that they or their members engage in any political activity or that they are involved in affecting the legislative process in any substantial manner. In the absence of such allegations, these organizations have no standing to represent their members' interests under the voter standing doctrine.

tributions for the same candidate were to be treated as gifts to the committee and not to the candidate. Plaintiffs, a nonprofit corporation promoting tax reform and one of its members, alleged that the revenue ruling was illegal because it permitted individuals to donate unlimited sums and to escape gift taxes by donating \$3,000 increments to separate committees which served only to funnel the money to central committees for the particular candidate. *Id.* at 891. Focusing on the corporate plaintiff's membership in applying the standing tests, the court noted that the named member was "a taxpaying citizen, voter and small contributor to election campaigns." *Id.* at 898. As such, plaintiff asserted that the challenged ruling substantially diminished "his ability to affect the electoral process and to persuade elected officials to adopt policies and programs he favors" by increasing the influence of a favored class of large contributors. *Id.* Applying constitutional standing doctrine to these circumstances, the court held that alleged diminution of one's vote and dilution of the ability to affect the electoral process "are judicially recognized wrongs and are thus sufficient allegations of actual injury." *Id.* at 899

Two Illinois voters, one a political candidate, the other a supporter, had standing to challenge the patronage system in Cook County because of the alleged injury to their interest "in an equal chance and an equal voice" in the election process. *Shakman v. Democratic Organization of Cook County*, 435 F.2d 267, 269-70 (7th Cir. 1970), *cert. denied*, 402 U.S. 909, 91 S.Ct. 1383, 28 L.Ed.2d 650 (1971). Since that interest is protected by the federal constitution, impairment thereof gives standing to the victims of the challenged practices. *Id.* at 269; see *Shakman v. Democratic Organization of Cook County*, 481 F.Supp. 1315, 1328 (N.D. Ill. 1979) (granting summary judgment to plaintiffs).

Finally, in *Common Cause v. Democratic National Comm.*, *supra*, a non-profit public interest corporation,

its chairman (a voter) and two elected politicians sought declaratory and injunctive relief against several national committees of political parties. Plaintiffs alleged that those groups circumvented the statute placing limits on individual campaign contributions. 333 F.Supp. at 806. The government's failure to prosecute these alleged violations resulted in the dilution of plaintiffs' participation in the voting process. *Id.* at 808. The court could find no "serious impediment to the plaintiffs' standing." *Id.*

Grounded in the equal protection safeguards of the fifth, rather than the fourteenth, amendment, plaintiffs' claims seem barely distinguishable from those involved in *Baker*. Both cases center on allegations that some arbitrary government action diluted the strength of voters in one group at the expense of those in another. Plaintiffs' injury is no less real because they claim discrimination based on issues rather than geography, nor is it relevant that the impact of allegedly harmful government conduct is felt during the battle over choosing representatives rather than in the number of representatives technically available to the aggrieved voters. The bottom line is that plaintiffs have alleged government action which has improperly biased the political process against the discrete group to which they belong.

Defendants contend that *Shakman, Shultz and Common Cause* incorrectly applied the concept of voter standing as set forth in *Baker v. Carr*. *Baker*, it is said, requires a showing of mathematical dilution of voting strength as a prerequisite of voter standing. Such precision supposedly is necessary to establish concrete personal injury.

The rationale of *Baker's* standing analysis cannot be so restricted. *Baker*, the three subsequent decisions and the case at bar all concern allegations that some arbitrary government action impaired one group's ability to affect the political process in preference to a more favored group. The injury to oppressed voters is as distinct and palpable here as in any of the previous cases.

The precision with which an injury can be defined is irrelevant to the concreteness of the injury, but that factor may affect considerations of causation or redressability. Defendants contend that the imprecise allegations of harm in the complaint mask its inadequate showing that defendants' actions have caused the harms plaintiffs allege or that an alteration or threatened alteration of the church defendants' tax status will ameliorate plaintiffs' injuries. Defendants' arguments, however, mischaracterize the complaint as objecting to the church's political activity *per se* and seeking relief in the form of a legislatively guaranteed right to abortion.

Plaintiffs have asserted a more circumscribed grievance and request. They do not demand a discontinuation of the church's political activity, nor do they seek, through the court, to prevent the election of antiabortion candidates. Plaintiffs claim that allegedly unconstitutional government conduct and illegal private conduct have distorted the electoral and legislative process by creating a system in which members of the public have greater incentive to donate funds to the Roman Catholic Church than to politically active abortion rights groups and in which each dollar contributed to the church is worth more than one given to non-exempt organizations. Plaintiffs do not complain of diminished representation and do not demand increases in actual representation. They complain of arbitrary government interference that disfavors them in the process of selecting representatives.

Viewed, as such, there can be no question that, even in the absence of a mathematically demonstrable injury, the complaint satisfies the causation and redressability requirements. Clearly, the government defendants' tax policy is the source of the distortion in the political process that plaintiffs complain of. An injunction against that discriminatory policy will restore the proper balance between adversaries in the abortion debate. The standing question is unaffected by the church defendants' possible

resolve to continue their current rate of political activity despite a decision requiring application of § 501(c)(3) to them and it is unaffected by plaintiffs' ultimate chances of success in their drive to preserve or expand women's rights to choose to complete or to terminate a pregnancy. That the court cannot guarantee plaintiffs' success in the political arena does not signify that the plaintiffs cannot gain anything from this litigation. On the contrary, plaintiffs have the opportunity to redress what they perceive is a grievous imbalance in the electoral and legislative process. It is sufficient for purposes of standing that "the plaintiff has shown *an* injury to himself that is likely to be redressed by a favorable decision." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976) (emphasis added) . . . He need not show that a favorable decision will relieve his every injury." *Larson v. Valente, supra*, 102 S.Ct. 1682 n.15; *accord, id.* at 1695-96, 1696 n.6 (Rehnquist, J. dissenting).¹⁰

¹⁰ The cases concerning challenges to the validity of the census which defendants rely upon, are inapposite to an application of standing doctrine to the particular voter claims here. Plaintiffs in those actions alleged that "the votes of persons in some states or regions will be diluted in comparison to those in" other areas if the census was not performed in accordance with strict constitutional mandates. *See Fed'n for Am. Immigration Reform v. Klutznick supra*, 486 F.Supp. at 566; *Sharrow v. Brown*, 447 F.2d 94 (2d Cir. 1971), *cert. denied*, 405 U.S. 968, 92 S.Ct. 1188, 31 L.Ed.2d 243 (1972). Standing was denied in those cases because plaintiffs could not show that they were among those who had sustained the injury or that apportionment in the manner sought would redress the injury. These shortcomings were due to the unique nature of the census methods of apportionment.

"[B]ecause of the way our method of apportionment operates" it was "impossible" for plaintiffs in *Fed'n for Am. Immigration Reform* to demonstrate that concrete harm would occur from the inclusion of illegal aliens in the census count. 486 F.Supp. at 570. Assuming that such inclusion would be unconstitutional and would result in a misallocation of some Congressional seats, the court could envision no way in which individual voters could show "which

3. *Equal Protection Standing.* Plaintiffs contend that in addition to having standing based upon injuries to rights guaranteed by the establishment clause and to their right to equal participation in the electoral process, they have standing based upon injuries to rights conferred by the equal protection provisions of the fifth amendment.

states might gain and which might lose representation." *Id.* at 567-70. Plaintiffs' complaint, thus, was fatally speculative in that it could not include an allegation that any plaintiffs would be affected by the challenged government conduct. *Id.* at 570. In other words, a given voter has no standing to challenge conduct which will injure some unknown and unknowable group of voters. *See id.* at 571.

In *Sharrow*, plaintiff was faced with an exceedingly burdensome, but not impossible, pleading problem. In order to show that his injury might be redressable, he needed to perform "a state-by-state study" of the effects of the claimed impropriety in the census procedures. 447 F.2d at 97. Only such analysis could show that New York was underrepresented as alleged and without this analysis he could not "establish that the failure to enforce [Section 2 of the Fourteenth Amendment] has resulted in a detriment to his rights of representation." *Id.*

The pro-choice plaintiffs need not demonstrate that the alleged discriminatory enforcement of § 501(c)(3) has resulted or will result in a specific loss in the number of pro-choice legislators, and are likely to be injured. The *Sharrow* requirement is inapplicable they are not suing merely as members of a group, some of whom because these plaintiffs allege unequal ability to *participate* in the electoral process, not actual loss of representatives vis-a-vis other groups, and they seek a non-discriminatory enforcement of the laws, not an increase in the number of offices available. The court can act upon their injury and demands without the type of statistical information required to prove injury and to structure relief in a census case. Unlike plaintiffs in *Fed'n for Am. Immigration Reform*, these voters all allege particular personal injury. This is no general claim that the census will come out "wrong" and thus harm some voters and help others. Rather, these plaintiffs allege that *all* prochoice voters, candidates and contributors have suffered the injury complained of and will benefit from the relief requested. Assuming the truth of their pleadings, each plaintiff in this category has shown particular interests at stake and likelihood of benefiting from the relief sought.

The thrust and importance of this argument are unclear. Having satisfied the requirements for establishment clause and voter standing, plaintiffs can press their claims of illegal disparate treatment. Thus it appears that the so styled "equal protection" standing would not enhance plaintiffs' position. Moreover, plaintiffs have not alleged any facts that state an injury to rights conferred by the fifth amendment alone. They do not assert that the Code has been applied to them discriminatorily or that they have been denied some tax benefits to which they are entitled. The differential treatment of plaintiffs and the church that plaintiffs complain of creates a legally cognizable injury only in conjunction with plaintiffs' first amendment claims. Their acknowledgement that the Code has been applied properly to them concedes that they have not been injured, in purely fifth amendment terms, by the alleged misapplication to the church defendants. Viewed from this perspective, their "equal protection" claim is reduced to an assertion that the federal defendants are acting improperly. *Schlesinger v. Reservists Comm. to Stop the War*, *supra*, 418 U.S. at 216-22, 94 S.Ct. at 2929-2932, and *Valley Forge*, *supra*, 102 S.Ct. at 764 make clear that individuals without a personal stake, distinct from that of the public generally, in the government's observance of the law do not have standing to complain of government malfeasance. Merely asserting, as plaintiffs have done, that the government has disregarded the law in its treatment of a third party does not confer standing.

B. Prudential Concerns

The twenty individual plaintiffs and three of the organizational plaintiffs, ARM, NWHN and Nassau-NOW have satisfied the Article III requirements for voter standing. In addition, the clergy plaintiffs and the Women's Center have satisfied those constitutional prerequisites for establishment clause standing. Before a

final decision on these parties' standing can be rendered, however, they must demonstrate that the court should not decline to confer standing because of prudential considerations. The Supreme Court has identified three such prudential limitations that will defeat the standing of a plaintiff who has satisfied the Article III case or controversy requirements. Where "the harm asserted amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure," the exercise of federal jurisdiction is not warranted. *Duke Power Co. v. Carolina Env. Study Group*, *supra*, 438 U.S. at 80, 98 S.Ct. at 2634. Access to federal courts may be denied also when a plaintiff seeks to assert the legal rights to a third party. *Id.* Finally, the judiciary should avoid hearing "abstract questions of wide public significance [when] other governmental institutions may be more competent" to do so. *Warth v. Seldin*, *supra*, 422 U.S. at 500, 95 S.Ct. at 2205.¹¹

¹¹ Defendants suggest that as part of the prudential limits on standing plaintiffs must show that they are within the "zone of interests" that § 501(c)(3) protects. Plaintiffs fail this zone of interests test, defendants maintain, because Congress never intended § 501(c) to preserve government neutrality in the electoral process. The structure of § 501(c) creates inequality among organizations depending upon the exemption for which each qualifies. For example, § 501(c)(3) organizations enjoy tax exemptions and the right to receive tax-deductible contributions at the cost of foregoing all electioneering and limiting their lobbying efforts to an insubstantial part of their activities; § 501(c)(4) organizations are not subject to these stringent requirements but they too are ineligible for tax-deductible contributions; and § 501(c)(19) must observe few restrictions on their political endeavors while enjoying tax benefits equivalent to those conferred on § 501(c)(3) groups. Plaintiffs' standing, however, is not undermined by the fact § 501(c)(3) is not a general safeguard against tax policy induced economic distortions of the political marketplace because the zone of interests, or nexus test, applies only to taxpayer suits. See *Duke Power Co. v. Carolina Env. Study Group*, *supra*, 438 U.S. at 78-80, 98 S.Ct. at 2633-2634. Plaintiffs already have conceded that they do not have taxpayer standing. See note 1, *supra*. The failure of § 501(c) to preserve neutrality in government intervention into

These prudential factors do not dictate barring plaintiffs' opportunity to proceed with this lawsuit. Although a large number of citizens likely share the injuries alleged by the clergy under the establishment clause and by the voters and abortion rights organizations under the first and fifth Amendments, these are not "generalized grievances" such that there will by any lack of sharp controversy. Standing is not a doctrine to restrict access to the courts, and prudential concerns should not be so applied if the court is satisfied that plaintiffs bring a live and pointed controversy to it. See, e.g., *Duke Power Co. v. Carolina Env. Study Group*, *supra*, 438 U.S. at 80-81, 98 S.Ct. at 2634-2635 ("Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested" prudential concerns generally do not bar standing); *United States v. SCRAP*, *supra*, 412 U.S. at 687-88, 93 S.Ct. at 2415-2416 ("standing is not to be denied simply because many people suffer the same injury.") Standing rules should be invoked to ensure that the court will adjudicate only an actual case or controversy and that, as an adversarial rather than an inquisitorial tribunal, it will be fully apprised of the facts and relevant law by a vigorous and interested presentation from the litigants. There is not the slightest reason to believe that the wide dispersion of plaintiffs' injuries will diffuse the contest before the court.

The prudential limitation on standing when rights of third parties are implicated avoids "adjudication of rights which those not before the Court may not wish to assert . . . [and assures] that the most effective advocate of the rights at issue is present to champion them. See *Singleton v. Wulff*, 428 U.S. 106, 113-14, 96 S.Ct. 2868,

the political process has caused the United States Court of Appeals for the District of Columbia Circuit to declare the statutory scheme in violation of the Constitution. See *Taxation with Representation of Washington v. Regan*, 676 F.2d 715 (D.C. Cir. 1982) (en banc).

2873-2874, 49 L.Ed.2d 826 (1976)." *Duke Power Co. v. Carolina Env. Study Group*, *supra*, 438 U.S. at 80, 98 S.Ct. at 2634. This lawsuit does not present the potential problem of a disinterested plaintiff advocating the interests of persons not before the court. Plaintiffs do not predicate their standing on the narrow *jus tertii* exceptions to the general rule that litigants must assert their own rights. The action, therefore, involves no rights that the rightholder would not wish to assert or that the plaintiffs are likely not to press vigorously.

The final prudential hurdle restricts access to judicial forums to resolve abstract policy questions of broad public importance. Courts erect this barrier from their awareness of the judiciary's limited competence to resolve societal, as opposed to personal, disputes and the superiority of other mechanisms to make complex social choices. Not all issues of broad public importance, however, are necessarily, or even better, left to the executive and the legislature. Plaintiffs do not seek resolution of "abstract questions;" they have articulated particular improper actions by the church defendants and illegal and unconstitutional disregard for that activity by the government defendants. Although the complaint implicates social policy issues, it does not call for judicial selection of an appropriate policy. Congress already has made that choice and set out the correct policy in § 501(c)(3); plaintiffs ask only for a judicial determination of whether defendants have observed Congress's commands concerning paying taxes and engaging in political activity. The prudential barriers do not restrict a court from adjudicating such a claim merely because of the interplay between the litigation and social controversy.

III

Defendants urge dismissal, even if plaintiffs do have standing, because the complaint does not state a claim upon which relief may be granted. Defendants contend

that plaintiffs' injuries, such as they are, do not amount to actionable wrongs either as establishment of religion or unconstitutional vote dilution. The church defendants further argue that regardless of the vitality of the complaint, it states no claim against them and that, therefore, they should be dismissed.

Plaintiffs are permitted to proceed "unless it appears beyond doubt that [they] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). Measured by this standard, counts two and three of the complaint certainly are adequate and the motion to dismiss them for failure to state a claim must be denied. Counts one and five, however, are fatally defective and must be dismissed. Plaintiffs have voluntarily withdrawn count four.

In count two of the amended complaint, plaintiffs allege that by granting the Roman Catholic Church a uniquely favored status under the tax code, the government defendants have violated their duty, arising under the first amendment, to treat all religious organizations similarly. In recent years, the Supreme Court has set out a three part test to determine establishment clause violations. A challenged government action withstands establishment clause scrutiny "if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion." *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 653, 100 S.Ct. 840, 848, 63 L.Ed.2d 94 (1980); accord, *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111-2112, 29 L.Ed.2d 745 (1971); *Brandon v. Bd. of Education*, 635 F.2d 971, 978 (2d Cir. 1980), cert. denied, — U.S. —, 102 S.Ct. 970, 71 L.Ed.2d 109 (1982).

It is not implausible that plaintiffs will be able to adduce facts that demonstrate that the government fa-

voritism allegedly shown to the defendants lacks secular purpose or that this preferential treatment advances the cause of the Roman Catholic Church. If plaintiffs are successful in either of these tasks, they will have demonstrated an actionable establishment clause violation. The difficult evidentiary burdens that plaintiff must shoulder to prove these allegations do not, by themselves, justify dismissal.¹²

Defendants place undue reliance on *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), in their argument that the tax benefits plaintiffs complain of do not rise to the level of actionable injuries. In *Walz*, there was no assertion of preferential treatment of one religion to the detriment of others. See *id.* at 673, 90 S.Ct. at 1413; *id.* at 689, 90 S.Ct. at 1421 (Brennan, J., concurring); *id.* at 696, 90 S.Ct. at 1425 (Harlan, J., concurring). The dictum, "[t]here is no genuine nexus between tax exemption and establishment of religion[.]" *id.* at 675, 90 S.Ct. at 1414, and the accompanying distinction between the transfer of funds to churches and abstaining from collecting taxes from them, *id.* at 674-75, 90 S.Ct. at 1414-1415, are applicable only in the context of a nondiscriminatory tax deduction extended broadly to social welfare organizations. In that circumstance, the state, by declining tax collection from all churches, observes the "wholesome neutrality" commanded by the establishment clause; taxing church property or income while all other private corporations operated for the public benefit were granted an exemption would constitute hostility to religion that the first amendment forbids. *Walz v. Tax Comm'n of the City of New York*, *supra*, 397 U.S. at 696-97, 90 S.Ct. at

¹² The neutrality of the statute itself, of course, does not immunize defendants if they apply that statute in a manner that favors one religion over all others. See, e.g., *Fowler v. Rhode Island*, 345 U.S. 67, 69, 73 S.Ct. 526, 527, 97 L.Ed. 828 (1953); *Niemotko v. Maryland*, 340 U.S. 268, 271-73, 71 S.Ct. 325, 327-328, 95 L.Ed. 267 (1951).

1425-1426 (Harlan, J., concurring). When, as here, the government conditions that tax advantage on abstinence from the political arena, but waives that condition for a single religious group, the waiver, rather than the exemption itself, runs afoul of the constitution. Even if the "tax subsidy" granted through § 501(c)(3) is not establishment *per se*, the preferential treatment shown to one religious group carries the appearance of an improper endorsement of sectarian belief.

In count three, plaintiffs allege a violation of their fifth amendment rights to due process, including equal protection of the law, by the government defendants' failure to revoke the church's § 501(c)(3) status. The gravamen of this claim is the adverse impact on the plaintiff's political voice that results from the government's financial sponsorship of the plaintiffs' opponents in a bitter public controversy. *Baker v. Carr*, *supra*, and its progeny confirmed that individuals have a right to equal participation in the electoral process and to be free from arbitrary government action that favors the political strength of some persons relative to others. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 554-68, 84 S.Ct. 1362, 1377-1384, 12 L.Ed.2d 506 (1964); *Shakman v. Democratic Organization of Cook County*, *supra*, 435 F.2d at 270; *Tax Analysts and Advocates v. Simon*, *supra*, 376 F.Supp. at 899. The defendants concede the existence of this right, but they argue that it is limited to protection against mathematical dilution of the vote. This reiteration of the argument made against the plaintiffs' claim of voter standing fails for the reasons similar to those found to support that standing. See pp. 480-483, *supra*. The *Baker* opinion evinces no indication that the right it recognized is fact-bound to the circumstances of the case. If the plaintiffs can prove that the government defendants have conferred a financial benefit on the church and that the benefit disadvantages the plaintiffs in electoral contests, then the plaintiffs will have made a *prima facie* case for relief. Congress is not free to subsidize the lobbying or elec-

tioneering activities of one group while arbitrarily denying the subsidy to others. *Taxation with Representation of Washington v. Regan*, *supra*, at 716. Similarly, the administrators of our laws are not free to condition the grant of a subsidy upon total abstinence from campaigning and minimal engagement in lobbying and then, without reason, to exempt one group from that requirement while allowing it the subsidy.¹³

In count five, plaintiffs seek a writ of mandamus to compel the government defendants to enforce the Code against the church defendants. It is firmly established that ordinarily mandamus relief is available only to compel ministerial administrative actions. See e.g., *Leonhard v. Mitchell*, 473 F.2d 709, 712-13 (2d Cir.), *cert. denied*, 412 U.S. 949, 93 S.Ct. 3011, 37 L.Ed.2d 1002 (1973); *Lovullo v. Froehlke*, 468 F.2d 340, 343, 345-46 (2d Cir. 1972), *cert. denied*, 411 U.S. 918, 93 S.Ct. 1555, 36 L.Ed.2d 310 (1973). It is equally accepted that discretion permeates IRS tax assessment and collection decisions. See e.g., *Bob Jones Univ. v. Simon*, 416 U.S. 725, 749-50, 94 S.Ct. 2038, 2052-2053, 40 L.Ed.2d 496 (1974); *American Ass'n of Commodity Traders v. Dep't of Treasury*, 598 F.2d 1233, 1235 (1st Cir. 1979). Accordingly, mandamus is an inappropriate remedy in this action.

Count one states simply that "[t]he activities of the Roman Catholic Church violate § 501(c)(3) of the Code and the First Amendment to the Constitution." This count fails to state a claim against the church defendants because they are incapable of violating the first amendment and they have breached no duty imposed by the Code and to plaintiffs.

¹³ The court makes no judgment at this time on the appropriate standard of review for these claims. The Court of Appeals for the District of Columbia Circuit recently applied the strict scrutiny test to claims, analogous to those at bar, that § 501(c) of the Code facilitated the speech of some persons over others. See *Taxation with Representation of Washington v. Regan*, *supra*, at 723-731.

The constitutional prohibition against establishment of religion prohibits government activities that enhance the status of one theology over all others or the status of religious beliefs and organizations generally over non-religion. Like all other protections afforded by the Bill of Rights, this stricture does not restrict purely private corporate action. Admittedly, the line between the public and the private is indistinct and, some say, vanishing, but the activities of the Roman Catholic Church, as alleged in the amended complaint, do not even approach this disputed border. Therefore, no action can proceed against the church defendants based on their abridgement of plaintiffs' first amendment, guaranteed rights.

The complaint also fails to state a violation of § 501 (c) (3) by the church defendants. They have received a determination letter from the IRS that confirms their tax-exempt status. Even if, as plaintiffs contend, that letter was erroneously or illegally issued, the church is entitled to rely upon it and withhold payment of taxes. The Code imposes no duty upon the church to gain pre-clearance from the IRS before embarking on activities that might trench upon the § 501(c) (3) prohibitions against political activity. If the church does engage in these proscribed endeavors, then it is liable to revocation of its exemption, but as long as it holds that exemption, it cannot be said to have violated the Code.

Moreover, the plaintiffs, by their own admission, have no direct grievance with the church defendants. The injuries set out in the complaint arise from illegal and unconstitutional government action. Plaintiffs concede that they do not seek to terminate the Roman Catholic Church's political program; they desire to place the church on an equal footing with themselves in the political battle over the right to choose to have an abortion. The disadvantage plaintiffs suffer comes from government indifference to church excesses and it is against the government, not the church, that plaintiffs have stated a claim.

IV

Defendants' final assault on the action flows from statutory and common law prescriptions against judicial review of plaintiffs' claims. Defendants contend that the doctrine of non-reviewability of certain administrative or prosecutorial decisions precludes consideration of the action. In addition, defendants maintain that Congress has explicitly excluded lawsuits such as this from those in which injunctive or declaratory relief is available.

A. Reviewability of Administrative or Prosecutorial Discretion

As a general rule, courts will review administrative actions in the absence of a clear and convincing showing of contrary legislative intent. *Eastern Ky. Welfare Rights Organization v. Simon*, 506 F.2d 1278, 1285 (D.C. Cir. 1974), *vacated on other grounds*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); *Medical Comm. for Human Rights v. Sec. & Exch. Comm'n*, 432 F.2d 659, 666 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972), *citing Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1510, 18 L.Ed.2d 681 (1967). Tempering this presumption is the recognition of a generous grant of discretion to the executive, particularly in decisions to prosecute law violators. *See, e.g., Marshall v. Jerrico*, 446 U.S. 238, 248, 100 S.Ct. 1610, 1616, 64 L.Ed.2d 182 (1980); *United States v. Nixon*, 418 U.S. 683, 693, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974); *Kixmiller v. Sec. & Exch. Comm'n*, 492 F.2d 641, 645 (D.C. Cir.) (1974).

This action fits much more closely within the rule allowing review than the rule excluding it. No statute explicitly bars all judicial review of IRS decisions concerning taxpayer status.¹⁴ To the contrary, Congress re-

¹⁴ As discussed *infra*, pp. 489-90, the Anti-Injunction Act, 26 U.S.C. § 7421(a) (1976), and the Declaratory Judgment Act, 28

cently added to the Code a section explicitly permitting judicial review of IRS decisions denying an organization § 501(c)(3) status. See Pub. L. 94-455, Title XII, § 1203(b)(2)(A), 90 Stat. 1690 (1976), codified at 26 U.S.C. § 7428 (1976).¹⁵ The jurisdictional restrictions contained in this section of the Code—limiting § 7428 suits to taxpayer actions for declaratory relief—do not undermine the inference that Congress recognizes the *competence* of the judiciary to reevaluate and where necessary to supervise IRS decisions concerning the award of § 501(c)(3) status. There is no significant difference in the decisional task presented to the courts in determining whether an organization has improperly been denied an exemption and in determining whether it has improperly been granted one. Both decisions require consideration of complex federal revenue collection policies. Both require delving into the nature of the taxpayer, its expenditures and its activities. Neither is susceptible to simple application of rules to facts.

Defendants place undue reliance on the doctrine of non-reviewable prosecutorial discretion. Their most compelling argument draws upon the deference courts show to executive decisions to allocate law enforcement resources in a manner that the executive deems most efficacious. Offsetting this resource efficiency argument, however, is the consistent judicial intervention into prosecutorial decisions that fail “to promote the ends of justice and den[y] rights conferred upon a citizen by the Constitution and by federal law.” *NAACP v. Levi*, 418 F. Supp. 1109, 1116 (D.D.C. 1976); see *Nader v. Saxbe*,

U.S.C. § 2201 (Supp. IV 1980) restrict the scope of remedies available in tax related controversies. Neither of these statutes, however, can be construed as a blanket preemption of judicial review of taxpayer status. They are limitations on remedies only.

¹⁵ Section 7428 authorizes certain organizations whose application for tax-exempt status is denied or revoked to bring an action for judicial declaration of the organization's entitlement to the exemption. See 26 U.S.C. § 7428 (1976).

497 F.2d 676, 679 n.19 (D.C. Cir. 1974); *Adams v. Richardson*, 480 F.2d 1159, 1166 (D.C. Cir. 1973). Moreover, this action is distinguishable from the ordinary instance of unreviewable prosecutorial discretion where the executive must choose from among many malfeasors those against whom it will enforce the law. Here, by contrast, the plaintiffs seek to compel the government to conform its actions to the law. They do not sue, for example, under a statute that criminalizes certain private behavior nor do they complain that the executive has failed to penalize a third party's violation of that statute. Rather plaintiffs allege that the IRS has illegally acted to bestow a tax benefit upon an unqualified organization. Plaintiffs do not seek to force the executive to expend its resources to prosecute a law violator; they are using their own resources to compel the government defendants to observe Congressionally and constitutionally imposed strictures on defendants' official actions. In sum, this case presents almost none of the circumstances that give rise to judicial deference to prosecutorial discretion.

B. *The Anti-Injunction Act*

The Code expressly prohibits, with certain exceptions not relevant here, all “suit[s] for the purpose of restraining the assessment or collection of any tax . . .” 26 U.S.C. § 7421(a) (1976). Defendants contend that this litigation falls within the prohibited category.

Reference to the words of the statute alone places plaintiffs' case beyond its purview. The complaint seeks an injunction commanding, not forbidding, the collection of taxes. Peering behind the words provides no greater support for defendants' position.

This section of the Code, known as the Anti-Injunction Act, apparently has no recorded legislative history. *Bob Jones Univ. v. Simon*, *supra*, 416 U.S. at 736, 94 S.Ct. at 2045. Courts have interpreted the statute as “. . . the protection of the Government's need to assess and collect

taxes as expeditiously as possible with a minimum of preenforcement judicial interference . . ." *Id.*; see *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7, 82 S.Ct. 1125, 1129, 8 L.Ed.2d 292 (1962). Defendants argue that this government need to ensure an unimpeded flow of revenue can be frustrated by suits, such as the case at bar, that challenge taxpayer status and compel tax collection because such suits place demands upon the IRS equivalent to actions to restrain collection. This argument is not without some merit, particularly because a successful third party action compelling tax assessment will likely be followed by a taxpayer suit under 26 U.S.C. § 7428 seeking a declaration of entitlement to an exemption. Such litigation over the right of an organization to enjoin certain privileges under the Code has the potential to encumber substantial IRS resources even if it does not directly interfere with the flow of revenue.

The majority of the courts that have considered the scope of the Anti-Injunction Act, however, have declined to interpret its prohibitions as broadly as defendants suggest. The consistent theme in these decisions is that the statute only extends to those actions it expressly refers to and that its effect is to require that taxpayers who object to the payment of taxes pay the assessment and sue for a refund. See, e.g., *Wright v. Regan*, 656 F.2d 820, 836 n.52 (D.C. Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3467 (Dec. 12, 1981) (No. 81-970); *Tax Analysts and Advocates v. Shultz*, *supra*, 376 F. Supp. at 891-92; *Eastern Ky. Welfare Rights Organization*, *supra*, 506 F.2d at 1284; *McGlotten v. Connally*, 338 F. Supp. 448, 453-54 (D.D.C. 1972) (three judge court). Persuasive reasoning supports these decisions. Third party suits to compel tax collection as a means to vindicate plaintiffs' rights do not pose the threat of clogging the federal revenue pipeline that taxpayer-sought injunctions would present because third party suits are "few and far between[.]" *Wright v. Regan*,

supra, 656 F.2d at 836 n.52. The Anti-Injunction Act would have a draconian effect beyond what Congress explicitly required if it were applied in these circumstances because it would foreclose any relief to third parties injured by executive decisions not to assess or collect taxes. The taxpayer who is unable to prevent collection because of the Act has open to it an alternative avenue of relief—a suit for refund. Plaintiffs here, and any person having a right to complain of another's lack of tax liabilities, by contrast, would have no means of redress if the Act preempted this lawsuit. See *Bob Jones Univ. v. Simon*, *supra*, 416 U.S. at 746, 94 S.Ct. at 2050; *National Restaurant Ass'n v. Simon*, 411 F. Supp. 993, 996 (D.D.C. 1976); *McGlotten v. Connally*, *supra*, 338 F. Supp. at 453-54. In light of the clear language of the statute and the strong and compelling authority limiting application of the statute to actions to restrain tax collection, plaintiffs are not barred from proceeding by the Anti-Injunction Act.

C. The Declaratory Judgment Act

In addition to their prayer for an injunction, plaintiffs seek a declaration that defendants have violated the Code and Constitution. The Declaratory Judgment Act confers jurisdiction on the court to issue such relief "except with respect to [controversies concerning] Federal taxes other than the actions brought under Section 7428 of the Internal Revenue Code of 1954, . . ." 28 U.S.C. § 2201 (Supp. IV 1980).

Conceding that they cannot bring a § 7428 action, plaintiffs change hats from those of the strict constructionists who advocated a literal reading of the Anti-Injunction Act to those of contextualists who argue that that statute and the Declaratory Judgment Act share the same purpose and thus should be interpreted to be coextensive. Plaintiffs' only support for this proposition is dicta from several opinions that interpreted the two

laws as "coterminous." *McGlotten v. Connally, supra*, 338 F. Supp. at 453; see *Bob Jones Univ. v. Simon, supra*, 416 U.S. at 733 n.7, 94 S.Ct. at 2044 n.7 (Declaratory Judgment Act restriction is "at least as broad as the Anti-Injunction Act"). Plaintiffs' authorities do not support the broad proposition that any tax case ripe for injunctive relief also is ripe for declaratory relief; those cases stated only that it appeared that Congress intended to exclude from the Declaratory Judgment Act *at least* those cases, other than § 7428 actions, that could not be brought because of the Anti-Injunction Act. See *Bob Jones Univ. v. Simon, supra*, 416 U.S. at 733 n.7, 94 S.Ct. at 2044 n.7.

Declaratory relief and injunctive relief are two different forms of the courts' remedial powers; there is no inherent reason that the two should be interpreted as equal in scope. Congress extended the Declaratory Judgment Act and created the § 7428 remedy in response to the *Bob Jones Univ.* decision. See S. Rep. No. 94-938, 94th Cong., 2d Sess. 586-87, reprinted in [1976] U.S. Code Cong. & Ad. News 3439, 4010-11. Nothing in the wording that Congress chose to allow these taxpayer suits for a declaration of a right to § 501(c)(3) status indicates that it desired to define the scope of the available remedy in terms of judicially recognized exemptions to the Anti-Injunction Act. The different purposes of the declaratory and injunctive remedies—the former allows a litigant to seek an order from the court before subjecting itself to liability, for example, by not paying taxes, while the latter more often is invoked to terminate ongoing injurious activity—suggests that the absence of cross-references between the Declaratory Judgment and Anti-Injunction Acts resulted from a conscious tailoring of each to the circumstances Congress thought most befitting. The Anti-Injunction Act, by its narrow wording, permits suits to compel collection of taxes; such suits will be brought by parties whose tax status is not in dispute in the litigation and who, as plaintiffs here,

can have standing only if they can show that a third party's privileged tax status imposes on them a discrete and palpable injury. At that point the opportunity for a declaration of rights would be surplusage. The party seeking to adjudicate its own tax status presents a very different injury, the denial of an exemption from future taxation. A declaration of its right to the exemption can prevent it from suffering any permanent damage, but allowing such a party to seek an injunction would interrupt collection of federal revenues and thereby promote the principal mischief Congress sought to prevent through the Anti-Injunction Act. This analysis supports defendants' position that no declaratory relief is available to plaintiffs.

V

Pursuant to the preceding discussion, the motion to dismiss is granted in part and denied in part. The church defendants motion to dismiss themselves from the lawsuit is granted. Plaintiffs Laurel Clinic, Inc., The Federation of Feminist Women's Health Center, Inc., Harrisburg Reproductive Health Services, Inc., Hagerstown Reproductive Health Services, Inc., and Women's Health Services, Inc. are dismissed for lack of standing. The motions to dismiss the other plaintiffs are denied. The twenty individual plaintiffs have standing as voters to contest the alleged infringement of their right to participate in the political process on equal terms with all others and free from arbitrary government interference. ARM, Nassau-NOW, and the National Women's Health Network, Inc. have standing to represent their voter-members injured by the challenged government conduct. In addition, the clergy plaintiffs and the Women's Center for Reproductive Health have satisfied the requirements to bring an action complaining of an unconstitutional establishment of religion. The motions to dismiss for failure to state a claim upon which relief may be granted or because the action is barred by the Anti-

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Injunction Act or the doctrine of administrative discretion are denied. The court finds that the Declaratory Judgment Act does not authorize relief in this action.

IT IS SO ORDERED.

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APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 80 Civ. 5590 (RLC)

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Plaintiffs,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY,
AND ROSCOE L. EGGER, JR.,
COMMISSIONER OF INTERNAL REVENUE

Feb. 27, 1985

OPINION

ROBERT L. CARTER, District Judge.

This renewed motion to dismiss the amended complaint for lack of subject matter jurisdiction is based upon the recent Supreme Court decision in *Allen v. Wright*, — U.S. —, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). The question presented is whether and to what extent the *Allen* opinion affects the outcome reached by the court in *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982) (Carter, J.) ("*ARM*"), with which familiarity is assumed. *ARM* held that the clergy plaintiffs and the Women's Center for Reproductive Health had standing under the establishment clause, and

that 20 individuals and three tax-exempt organizations had standing as voters in this litigation.¹

The Supreme Court held in *Allen* that a nationwide class of parents of black children attending public schools in districts undergoing desegregation, but who had not actually been denied entry to allegedly discriminatory private schools, did not have standing to challenge the tax exempt status of those schools.

In applying *Allen* to the present case it must first be noted that the Court did not close the door on private suits challenging government grants of tax exemption, see *Allen*, 104 S.Ct. at 3332 (noting possible propriety of standing in *Coit v. Green*, 404 U.S. 997, 92 S.Ct. 564, 30 L.Ed.2d 550 (1971), summarily aff'g. sub nom., *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.)), which made allegations comparable to those in *Allen* but with different facts), but used traditional analysis in concluding that the *Allen* plaintiffs lacked standing.

The Court held that "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen*, 104 S.Ct. at 3325. This is an integral part of the precedent upon which both *Allen* and *ARM* were decided. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-476, 102 S.Ct. 752, 757-761, 70 L.Ed.2d 700 (1982); *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343 (1975). Separation of powers, as *Allen*, 104 S.Ct. at 3330 n.26, clearly demonstrates, is not a distinct line of analysis but serves as the basis of the "traceability" part of the traditional

¹ As a further result of *ARM*, five of the original plaintiffs, all abortion clinics, were denied standing for failure to show injury in fact and two of the original defendants, the United States Catholic Conference and the National Conference of Catholic Bishops, had the complaint against them dismissed since they were incapable of violating the First Amendment and had not violated the Internal Revenue Code in light of an explicit tax exemption from the IRS.

three part standing test of personal injury fairly traceable to the defendants allegedly illegal conduct which is likely to be remedied by the requested relief. *Id.* at 3325.²

More specifically, plaintiffs in *Allen* asserted two types of damage: the first was characterized as either a generalized injury based upon the government's behavior in granting tax exemptions to the schools or as denigration suffered by all blacks as a result of government discrimination. In either case, the Court found the harm to be insufficiently personal to constitute a justiciable cognizable injury. *Id.* at 3326. The second alleged injury was the children's diminished ability to receive an education in a racially integrated school. *Id.* at 3328. This was found wanting because desegregated schooling was not fairly traceable to the allegedly illegal conduct of the IRS. *Id.* at 3326.

A

While it is clear that stigmatizing injuries are the sort of noneconomic wrongs caused by government conduct that sometimes can be sufficient to support standing, *Heckler v. Mathews*, 465 U.S. —, —, 104 S.Ct. 1387, 1395, 79 L.Ed.2d 646 (1984), such status is accorded only to those who can allege a resultant harm to a concrete, personal interest. *Allen*, 104 S.Ct. at 3327-328. The *ARM* decision used this analysis to find that the lay and organizational plaintiffs did not have standing while the clergy plaintiffs and the Women's Center for Reproductive Health, a church affiliated guidance service, asserted a "compelling and personalized" injury, *ARM*, 544 F.Supp. at 479, that "diminishes their position in the

² While the "fairly traceable" and "redressability" components of the constitutional standing inquiry were initially articulated as two facets of a single causation requirement, both *Allen* and *ARM* treat them as distinct inquiries for analytical purposes. *Allen*, 104 S.Ct. at 3326 n.19; *ARM*, 544 F.Supp. at 478. The same practice will be followed here.

community, encumbers their calling in life, and obstructs their ability to communicate effectively their religious message." *Id.* at 480. Such allegations meet the test enunciated in *School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963), that would-be plaintiffs must show that they are "directly affected by the laws and practices against which their complaints are directed." *Id.* at 224 n.9, 83 S.Ct. at 1572 n.9.

Personal injury, however, is not enough. Plaintiffs must also clear the two additional hurdles of the standing test. This court in *ARM*, found plaintiffs' establishment clause injury to be traceable to defendants' conduct because "[t]acit government endorsement of the Roman Catholic Church view of abortion hampers and frustrates these plaintiffs' ministries." *Id.* at 480. The court therefore found plaintiffs' asserted injuries to be traceable to "official approval of an orthodoxy antithetical to [plaintiffs'] spiritual mission." *Id.*

Their injury flows directly from the federal defendants allowing the church defendants the privilege of retaining § 501(c)(3) status while electioneering and denying this privilege to other religious organizations. The granting of a uniquely favored tax status to one religious entity is an unequivocal statement of preference that gilds the image of that religion and tarnishes all others. A decree ordering the termination of this illegal practice and restoring all sects to equal footing will redress this injury.

Id.

This finding is consistent with *Allen*. *Allen* holds that tax exemption granted to an organization that allegedly practices an illegal activity does not in itself constitute the necessary connection between government action and injuries that flow from the activity. The lack of desegregated schooling, defined in *Allen* as a cognizable injury, was not found directly traceable to government action.

"From the perspective of the IRS, the injury to respondents is highly indirect and 'results from the independent action of some third party [i.e., the discriminatory private school] not before the court.'" *Allen*, 104 S.Ct. at 3328, quoting, in part, *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976). The Court stated that if a direct link between tax exemption and desegregation could be established, i.e., if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration, then the alleged injury would be fairly traceable to unlawful IRS grants of tax exemptions. *Allen*, 104 S.Ct. at 3328.

Similarly, redress of the establishment clause injury sustained in *ARM* does not depend upon any action by a third party. Redress will come directly from the government's consistent enforcement of the tax laws, not from any change in the political activities of the Church. Plaintiffs' establishment clause injury centers on the quasi-official imprimatur accorded the anti-abortion activities of the Church through tax exemptions and the restrictions placed on the establishment clause plaintiffs' political activities by § 501(c)(3). Whether the allegations can be proved is not a question for this court now to decide since it must accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979).

It is thus apparent that *Allen* supports the court's earlier decision which denied standing under the establishment clause to those plaintiffs who, similar to those in *Allen*, asserted only general claims of denigration, but which granted standing to those plaintiffs who could pass the three part test of distinct personal injury, direct traceability, and possible redress by defendants.

B

As pointed out in the earlier opinion, it has consistently been held that voters have standing to contest the alleged infringement of their right to participate in the political process on equal terms with all others free from arbitrary government interference. *ARM*, 544 F.Supp. at 480-481 citing *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (plaintiffs' unjustifiable inequality vis-a-vis voters in other counties justified standing); *Shakman v. Democratic Organization of Cook County*, 481 F.Supp. 1315 (N.D.Ill.1979) (standing granted to challenge patronage system because of the alleged injury to plaintiffs' interest in an equal chance and an equal voice in the election process); *Tax Analysts and Advocates v. Shultz*, 376 F.Supp. 889 (D.D.C. 1974) (non-profit corporation and one of its members granted standing to challenge revenue ruling concerning campaign gifts because alleged diminution of one's vote and dilution of the ability to affect the electoral process are judicially recognized wrongs and are thus sufficient allegations of actual injury); *Common Cause v. Democratic National Committee*, 333 F.Supp. 803 (D.D.C.1971) (allegations that several national committees of political parties circumvented the statute placing limits on individual campaign contributions, thereby diluting plaintiffs' participation in the voting process, were sufficient to find standing).

Here again, mere personal injury is not enough. Defendants argue that *Allen's* yardstick in regard to traceability and redressability require that voter standing be denied in this case. Defendants, however, misconstrue the basis for the *ARM* holding that voter standing requirements have been met. The injury to plaintiffs is not, as defendants state, "alleged politicking by the Catholic Church." *Defendants' Memorandum of Law in Support of Their Renewed Motion to Dismiss* at 15, but the alleged arbitrary inequality of the plaintiffs in the political

process vis-a-vis the Catholic Church created by the IRS's grant of tax exemption to the latter. The judicially cognizable injury in *Allen* was segregated schooling which was neither created nor remediable by IRS action alone. The injury alleged in *ARM* is unequal footing in the political arena, a condition completely traceable and within the control of the IRS. The *Allen* analysis and *ARM's* are, therefore, as one and the court's earlier holding granting standing to the present plaintiffs remains unaffected by *Allen*.

C

Moreover, in *ARM*, the successful plaintiffs were found to have surmounted the three prudential limitations that can defeat standing even when the Article III case or controversy standards are met. *ARM*, 544 F.Supp. at 484. The three prudential limitations preclude standing when: (1) the harm asserted amounts to only a generalized grievance shared by a large number of citizens in a substantially equal measure, (2) plaintiffs assert the rights of third parties, or (3) abstract questions of wide public significance are presented when other governmental institutions may be more competent to decide them.³ *Id.* (citations omitted). *Allen* does not reach these issues, but its analysis is fully congruent with *ARM's* treatment of these considerations.

Concerning the "generalized grievance" limitation, *ARM* full analyzed the specificity of the remaining plaintiffs' injuries, distinguishing the harm to clergy plaintiffs and the Women's Center for Reproductive Health from that complained of by the excluded plaintiffs as well as plaintiffs in, e.g., *Valley Forge Christian College v. Amer-*

³ The "zone of interests" test was held to be inapplicable to the *ARM* context since that test applies only to taxpayer suits and plaintiffs concede that they do not have taxpayer standing. *ARM*, 544 F.Supp. at 484 n.11; see *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 78-79, 98 S.Ct. 2620, 2633-2634, 57 L.Ed.2d 595 (1978).

icans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S.Ct. 752, L.Ed.2d 700 (1982). *ARM*, 544 F.Supp. at 4477-480, 484. Voter standing is also particularized since plaintiffs, despite articulated desires to be politically active on behalf of their pro-choice views, can not do so without risking their valuable § 501(c)(3) status. This personal denial of equal treatment is precisely the type of standing required by *Allen* since parent plaintiffs in that case "were not personally denied equal treatment by the challenged discriminatory conduct." *Allen*, 104 S.Ct. at 3327.

The question of whether plaintiffs are addressing other parties' rights was answered squarely in the negative by *ARM*, 544 S.Supp. at 485. Since no assertion otherwise is made by defendants and *Allen* is silent on the issue, the previous ruling need not be disturbed.

Finally, there is the matter of whether other governmental institutions may be more competent to decide this issue. As stated in *Allen* and noted in defendants' briefs, the separation of powers doctrine.

counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. The Constitution, after all, assigns to the Executive Branch and not to the Judicial Branch the duty to 'take care that the laws be faithfully executed.' U.S. Const. Art. II, § 3. We could not recognize [plaintiffs'] standing in this case without running afoul of the structural principle.²⁶

²⁶ . . . [O]ur analysis of this case does not rest on the more general proposition that no consequence of the allocation of administrative enforcement resources is judicially cognizable. . . . Rather we rely on separation of powers principles to interpret the 'fairly traceable' component of the standing requirement.

Allen, 104 S.Ct. at 3330.

Whether courts provide an appropriate forum for deciding the matter presented thus implicates questions considered in the Article III analysis. This dovetailing of constitutional and prudential concerns was explicitly recognized by *Allen*:

Case or controversy considerations, the Court observed in *O'Shea v. Littleton*, . . . 414 U.S. [488,] 499, 94 S.Ct. [669], 677[, 38 L.Ed.2d 674 (1974),] 'obviously shade into those determining whether the complaint states a sound basis for equitable relief.' . . . Most relevant to this case is the principle articulated in *Rizzio v. Goode* . . . 423 U.S. [362,] 378-379, 96 S.Ct. [598,] 607-608[, 46 L.Ed.2d 561 (1976)]:

'When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs,' *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896[, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230] (1961), quoted in *Sampson v. Murray*, 415 U.S. 61, 83[, 94 S.Ct. 937, 949, 39 L.Ed.2d 166] (1974). *Id.*

In addition to the previously discussed finding of direct harm to plaintiffs and its traceability to defendants' actions, *ARM* further addressed this final prudential concern of limiting judicial activity to the enforcement of "specific legal obligations whose violation works a direct harm," *Allen*, 104 S.Ct. at 3330, by holding that:

Although the complaint implicates social policy issues, it does not call for judicial selection of an appropriate policy. Congress has already made that choice and set out the correct policy in § 501(c)(3); plaintiffs ask only for a judicial determination of whether defendants have observed Congress' commands concerning taxes and engaging in political ac-

tivity. The prudential barriers do not restrict a court from adjudicating a claim merely because of the interplay between the litigation and social controversy.

ARM, 554 F.Supp. at 485

For the above stated reasons, defendants' renewed motion to dismiss the amended complaint for lack of subject matter jurisdiction is denied.

IT IS SO ORDERED.

APPENDIX F

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 30th day of July one thousand nine hundred and eighty-seven.

Docket No. 86-6092

IN RE UNITED STATES CATHOLIC CONFERENCE and
NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Appellants,

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Plaintiffs-Appellees,
v.

JAMES A. BAKER, III, Secretary of the Treasury, and
ROSCOE L. EGGER, JR., Commissioner of Internal Revenue,
Defendants.

[Filed July 30, 1987]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants, In Re United States Catholic Conference and National Conference of Catholic Bishops

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

104a

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

105a

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number 86-6092

IN RE UNITED STATES CATHOLIC CONFERENCE

NOTICE OF MOTION
FOR STAY OF THIS COURT'S MANDATE

[Filed June 18, 1987]

MOTION BY: *(Name, address and tel. no. of law firm
and of attorney in charge of case)*

Charles H. Wilson
Williams & Connolly
839 Seventeenth Street, N.W.
Washington, D.C. 20006

OPPOSING COUNSEL: *(Name, address and tel. no. of
law firm and of attorney in
charge of case)*

Marshall Beil
19th West 44th Street
Suite 711
New York, New York 10036

Has consent of opposing counsel:

A. been sought? ☒ Yes ☐ No
B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

106a

Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)

Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? ☐ Yes ☒ No
B. by firm date of argument notice? ☐ Yes ☒ No
C. If Yes, enter date: _____

EMERGENCY MOTIONS, MOTIONS FOR STAYS &
INJUNCTIONS PENDING APPEAL N/A

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need
for this motion? ☐ Yes ☐ No

If No, explain why not:

Will the parties agree to maintain the
status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed: Judge
Robert L. Carter

Brief statement of the relief requested: A further stay
of civil contempt sanctions imposed by the District Court
pending petition for, and final disposition, of a writ of
certiorari, in the event movants' petition for rehearing is
denied.

Complete Page 2 of This Form

By: (Signature of attorney)

/s/ Charles H. Wilson
Signed name must be printed beneath

/s/ CHARLES H. WILSON

107a

Appearing for: (Name of party)

U.S. Catholic Conf.

Date

June 18, 1987

[Appellant] or Petitioner:

☐ Plaintiff ☐ Defendant

Appellee or Respondent:

☐ Plaintiff ☐ Defendant

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it
hereby is granted.

[Filed Jul. 30, 1987]

/s/ Jon O. Newman

/s/ Amalya L. Kearse
(per J.O.N.)

/s/ Richard J. Cardamone
(per J.O.N.)

108a

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number 86-6092

IN RE U.S. CATHOLIC CONFERENCE

NOTICE OF MOTION
FOR FURTHER STAY PENDING
PETITION FOR CERTIORARI

[Filed Aug. 14, 1987]

MOTION BY: *(Name, address and tel. no. of law firm
and of attorney in charge of case)*

Charles H. Wilson
Williams & Connolly
839 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 331-5067

OPPOSING COUNSEL: *(Name, address and tel. no. of
law firm and of attorney in
charge of case)*

Marshall Beil
19 West 44th Street
Suite 711
New York, New York 10036
(212) 575-8500

109a

Has consent of opposing counsel:

A. been sought? ☒ Yes ☐ No
B. been obtained? ☒ Yes ☐ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)

Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order?
B. by firm date of argument notice? ☐ Yes ☐ No
C. If Yes, enter date: N/A

EMERGENCY MOTIONS, MOTIONS FOR STAYS &
INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8) N/A

Would expedited appeal eliminate need
for this motion? ☐ Yes ☐ No
N/A

If No, explain why not:

Case already decided

Will the parties agree to maintain the
status quo until the motion is heard? ☒ Yes ☐ No

Judge or agency whose order is being appealed: Judge
Robert L. Carter

Brief statement of the relief requested: Extension of
stay of mandate for an additional two weeks to permit
appellants to present petition for certiorari to the Su-
preme Court.

Complete Page 2 of This Form

By: *(Signature of attorney)*

/s/ Charles H. Wilson

Signed name must be printed beneath

CHARLES H. WILSON

Appearing for: *(Name of party)*

U.S. Catholic Conference

Date

August 13, 1987

Appellant

☐ Plaintiff ☒ Defendant

Appellee or Respondent:

☐ Plaintiff ☐ Defendant

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

[Filed Aug. 20, 1987]

/s/ Jon O. Newman

/s/ Amalya L. Kearse
(per J.O.N.)

/s/ Richard J. Cardamone
(per J.O.N.)

No. 87-416

OCT 5 1987

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE AND
NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
PETITIONERS

v.

ABORTION RIGHTS MOBILIZATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

CHARLES FRIED

Solicitor General

MICHAEL C. DURNEY

Acting Assistant Attorney General

MICHAEL L. PAUP

ROBERT S. POMERANCE

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 633-2217

QUESTION PRESENTED

Whether the order holding petitioners in contempt for failure to comply with a discovery order should be set aside on the ground that the plaintiffs lack standing to bring the underlying lawsuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-416

UNITED STATES CATHOLIC CONFERENCE AND
NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
PETITIONERS

v.

ABORTION RIGHTS MOBILIZATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 824 F.2d 156. The opinion of the district court holding petitioners in contempt (Pet. App. 44a-51a) is reported at 110 F.R.D. 337. The opinions of the district court denying the motions to dismiss (Pet. App. 54a-92a, 93a-102a) are reported at 544 F. Supp. 471, and 603 F. Supp. 970, respectively.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1987. A petition for rehearing was denied on July 30, 1987 (Pet. App. 103a-104a). The petition for a writ of certiorari was filed on September 11, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The non-federal respondents, various individuals and tax-exempt organizations that support the availability

of legal abortion, brought this suit in the United States District Court for the Southern District of New York, seeking to compel the Secretary of the Treasury and the Commissioner of Internal Revenue to revoke the tax exemption of the Roman Catholic Church.¹ The complaint alleged that the Church has engaged in lobbying activity and participated in political campaigns in opposition to legalized abortion, using tax-deductible contributions. It further alleged that the Secretary and the Commissioner are aware that these activities exceed the limitations placed by the Internal Revenue Code² on organizations classified as tax-exempt under Section 501(c)(3), but have failed to enforce those limitations against the Church.³ The plaintiffs sought a declaration that both the political activities of the Roman Catholic Church and "the inaction by the Secretary and the Commissioner" violate the Code and

¹ The suit also named as defendants the petitioners, the United States Catholic Conference (USCC) and the National Conference of Catholic Bishops (NCCB), which are the two principal national organizations of the Roman Catholic Church in the United States. The district court, however, ruled that the complaint failed to state a claim against the petitioners because they were entitled to rely upon tax exemptions granted by the government. Accordingly, the petitioners were dismissed as defendants. Pet. App. 84a, 91a.

² Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

³ Section 501(c)(3) of the Code provides an exemption from federal income tax for an entity "organized and operated exclusively for religious, charitable, * * * or educational purposes, * * * no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h) [which details the permissible limits of expenditures to influence legislation]), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." Section 501(c)(3) organizations are exempt from income tax, and contributions made to them are generally tax-deductible. See I.R.C. § 170.

Constitution. The plaintiffs also sought an injunction directing the Secretary and Commissioner to revoke the tax exemptions of the Church,⁴ to assess and collect all taxes thereby due, and to notify donors that contributions to the Church are not tax-deductible. Pet. App. 4a-5a, 60a-61a; C.A. App. 22-23.

2. The district court denied a motion to dismiss the suit for lack of standing (Pet. App. 54a-92a), and it subsequently denied a renewed motion to dismiss on that ground in light of this Court's intervening decision in *Allen v. Wright*, 468 U.S. 737 (1984) (Pet. App. 93a-102a). The court held that certain of the plaintiffs have standing to proceed against the federal respondents under one or both of two theories.

First, the court held that both the individual plaintiffs who are members of the clergy and the church-affiliated Women's Center for Reproductive Health have "establishment clause standing" (Pet. App. 62a-69a). The court stated that the clergy members "must counsel those in their care in accordance with religious laws that command consideration of abortion as the morally required response to pregnancy" (*id.* at 68a (footnote omitted)), and that the Women's Center "provides guidance to women in decisionmaking on issues pertaining to family life, including childbearing" (*ibid.*). The court characterized the Church's tax exemption as "tacit government endorsement" of the Church's position on abortion, and concluded that it caused a "discrete spiritual injury" to some of the plaintiffs because "official approval of an orthodoxy antithetical to their spiritual mission diminishes their position in the community, encumbers their calling in life, and obstructs their ability to communicate effectively their religious message" (*id.* at 67a-68a).

⁴ Petitioners hold an "umbrella" exemption under Section 501(c)(3), covering tens of thousands of individual entities (including dioceses, parishes, schools and hospitals), which are part of or affiliated with the Roman Catholic Church in the United States.

Second, the district court held that all of the individual plaintiffs and three of the advocacy organizations, as representatives of their members, have "voter standing," within the meaning of *Baker v. Carr*, 369 U.S. 186 (1962), to challenge "alleged government action which has improperly biased the political process against the discrete group to which they belong" (Pet. App. 72a). In the district court's view, continuation of the tax exemption "distorted" the electoral process by allowing tax deductions for donations to the Church but not for donations to politically-active abortion rights groups (*id.* at 73a). The court suggested that "[a]n injunction against that discriminatory policy will restore the proper balance between adversaries in the abortion debate" (*ibid.*).

On both occasions that it denied motions to dismiss, the district court declined to certify the standing question for interlocutory appeal under 28 U.S.C. (& Supp. III) 1292(b). Subsequently, the court of appeals denied the government's petition for a writ of mandamus or prohibition directing the district court to dismiss the complaint for lack of standing. On October 6, 1986, this Court denied the government's petitions for a writ of certiorari to review the court of appeals' order, and, alternatively, for a writ of mandamus directing the district court to dismiss the action (Nos. 86-157 and 86-162).

3. The plaintiffs are currently seeking, through subpoenas and other process, detailed discovery of information concerning the Church's tax status and its alleged lobbying and electioneering activities. To that end, they have requested documents from petitioners and from the Internal Revenue Service. See C.A. App. 164-169, 200-201.⁵ The documents requested from petitioners are

⁵ The federal respondents have maintained that disclosure of much of the information requested from the government is precluded by Section 6103 of the Code, which prohibits government disclosure of tax returns and confidential return information, except as specifically provided by statute. See C.A. App. 182-195.

voluminous and include the following: records relating to the formulation and interpretation of the bishops' position on abortion; records relating to church officials' contacts with presidential candidates and other candidates for public office; information regarding financial relationships between Catholic institutions and right-to-life organizations; and returns, records, and correspondence submitted by petitioners to the Internal Revenue Service (*id.* at 164-169). The plaintiffs have indicated their intent to depose cardinals and other high-ranking church officials who they believe may be involved in these activities (*id.* at 200-201).

The district court narrowed the discovery requests in limited respects, but otherwise ordered petitioners to comply with them (Pet. App. 48a-49a). Petitioners subsequently advised the court that they "cannot, in conscience, comply with the subpoenas" (*id.* at 44a). On May 8, 1986, the court granted the plaintiffs' motion to hold petitioners in civil contempt for noncompliance with the court's discovery order, and it imposed on each of the petitioners a fine of \$50,000 per day, to begin on May 12, 1986, and to continue "for each day that the USCC/NCCB continues to defy the court's order" (*id.* at 50a-51a). That order was stayed pending appeal, and the stay remains in effect pending this Court's disposition of the petition for a writ of certiorari.

4. Petitioners appealed the contempt order, arguing that it should be set aside because the district court lacks jurisdiction over the underlying action because of the plaintiffs' lack of standing. A divided panel of the court of appeals affirmed (Pet. App. 1a-43a). The majority held that petitioners, as non-party witnesses, "may challenge their contempt adjudication only on the limited ground that the District Court lacks even colorable jurisdiction over the underlying lawsuit" (*id.* at 18a), and may not seek to have the contempt order expunged by bringing "a full-scale challenge to the correctness of the district court's exercise of such jurisdiction" (*id.* at 10a). Applying that test,

the majority concluded that the trial court's assumption of jurisdiction rests on a sufficient basis to support the contempt judgment. The majority found that the plaintiffs' suit "is more than a citizen effort to have the tax laws enforced and more than a taxpayer effort to complain of tax exemptions of others that might violate the Establishment Clause" (*id.* at 19a). Rather, the majority concluded, the plaintiffs have asserted "at least a colorable basis" (*id.* at 20a) on which to predicate standing by "claim[ing] direct, personal injury arising from the fact that the federal defendants' failure to enforce the political action limitations of section 501(c)(3) has placed the plaintiffs at a competitive disadvantage with the Catholic Church in the arena of public advocacy on important public issues" (*id.* at 19a).

Judge Cardamone dissented, stating that the court should have decided whether the district court's assumption of jurisdiction over the suit was correct, not merely whether it was "colorable" (Pet. App. 21a-41a). The dissent explained that, if the petitioners were correct that there was no standing, then the majority's ruling had the effect of forcing them to comply with an order of the district court that "exceeded the jurisdictional limits of Article III" (*id.* at 29a). Moreover, the dissent continued (*id.* at 33a), "[t]o emasculate the witnesses' right to appeal by so narrow a view of what an appellate court may review, effectively deprives these contemnors of any meaningful appeal."

DISCUSSION

In affirming the district court's contempt order on the ground that the court had a "colorable" basis for jurisdiction, the court of appeals has permitted the district court to exceed the Article III limitations on its jurisdiction. Even under the limited scope of review of the standing question adopted by the court of appeals, we believe that the contempt order must be vacated because it is clear beyond doubt that the plaintiffs lack standing and therefore that the district court lacks jurisdiction to entertain the underlying action. For the reasons explained in detail

in our previous submissions to this Court (Nos. 86-157 and 86-162), the district court's order upholding the plaintiffs' standing is so directly contrary to this Court's controlling precedent that it cannot provide even a "colorable" basis for jurisdiction over the lawsuit. Accordingly, the court of appeals, presented with the issue in a direct appeal that is not burdened by the restrictions that attend the issuance of an extraordinary writ, should have granted petitioners' request to vacate the contempt order because of lack of jurisdiction over the underlying lawsuit. See *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947).

The court of appeals' error in finding a "colorable" basis for standing involves fundamental principles of justiciability established by the Constitution and by this Court. Moreover, the continuation of this lawsuit threatens to produce burdensome discovery that will intrude deeply into the internal policies and practices of the Internal Revenue Service and the Church, thereby interjecting the judiciary into sensitive matters beyond its province. Accordingly, we believe that it is appropriate for the Court to grant certiorari to review the court of appeals' decision.

1. It is well established that in order to have standing to maintain a lawsuit a plaintiff must "allege[] such a personal stake in the outcome of the controversy" as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf" (*Warth v. Seldin*, 422 U.S. 490, 498-499 (1975) (emphasis in original), quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). The "core component" of standing, derived directly from the "cases" or "controversies" requirement of Article III of the Constitution, requires the plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief" (*Allen v. Wright*, 468 U.S. 737, 751 (1984)). That injury cannot be an "abstract" one (*O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)); it must be "distinct and palpable" (*Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (quotation omitted)).

In addition to these constitutional requirements, this Court has also recognized that the standing doctrine embraces certain prudential limitations on the exercise of federal jurisdiction, including "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches" (*Allen v. Wright*, 468 U.S. at 751). A federal court "is not the proper forum" to press general complaints about the way in which government goes about its business" (*id.* at 760, quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983)).

On several occasions in recent years, the Court has reaffirmed these basic standing principles and emphasized that they ordinarily deny access to the federal courts by plaintiffs who seek to litigate the claim that the government is failing to enforce its laws—in particular, laws relating to tax exemptions—against a third party. Most recently, in *Allen v. Wright*, *supra*, the Court held that the parents of black public school children lacked standing to challenge the tax-exempt status of allegedly discriminatory private schools. The Court held that the claim that blacks were denigrated by government recognition of those schools' tax exemptions was too abstract to be judicially cognizable; rather, such an injury could confer standing only if the stigma was suffered "as a direct result of having personally been denied equal treatment" (468 U.S. at 755). The Court also rejected the attempt to base standing on the assertion that the tax-exempt private schools impaired the desegregation of public schools. The Court explained that the line of causation between the government's enforcement of the tax laws and the desegregation of plaintiffs' schools was far too weak; it was sheer speculation whether the withdrawal of tax exemptions would have any effect on school desegregation (*id.* at 758).

In *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), this Court also found no standing to litigate whether the government was properly enforcing

the tax laws against other persons. A group of indigent plaintiffs had sued Treasury officials to challenge a Revenue Ruling that allowed nonprofit hospitals to qualify for tax exemption under Section 501(c)(3) even if they provided no more than emergency room services to the indigent. This Court held that the plaintiffs' allegations of injury in the form of the denial of services by these hospitals did not confer standing because it was "purely speculative" whether the alleged injury could fairly be traced to the government's tax enforcement action "or instead result[s] from decisions made by the hospitals without regard to the tax implications" (426 U.S. at 42-43). And in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), the Court held that the plaintiffs lacked standing to challenge the conveyance of surplus federal property to sectarian institutions because they "fail[ed] to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees" (454 U.S. at 485 (emphasis in original)). These decisions demonstrate that the plaintiffs in the instant case lack standing to challenge the tax exemption of the Catholic Church.

2. The court of appeals' holding that there is a "colorable" basis for believing that the plaintiffs have "voter standing," under *Baker v. Carr*, 369 U.S. 186 (1962), is clearly mistaken.⁶ The *Baker* plaintiffs lived in a

⁶ The court of appeals rested its finding of a "colorable" basis for standing solely on the "voter standing" rationale advanced by the district court (see Pet. App. 19a). As explained in further detail in our petition for certiorari in No. 86-157, the district court's "establishment clause standing" holding, which the court of appeals did not address, is unsupportable. The claim by some of the plaintiffs that their religious mission and values, which favor the continuation of legalized

"disfavored" county, one with a "gross disproportion of representation to voting population" (*id.* at 207), and the Court held that they suffered concrete injury to their voting power on that account. The claim of the plaintiffs here is quite different. As the district court acknowledged (Pet. App. 73a), their complaint has nothing to do with diminished representation or diluted voting power; hence, *Baker v. Carr*, *supra*, does not support their standing claim. Rather, they assert that they and their cause are at a disadvantage in the political arena, on the theory that the Church can lobby and conduct political activity with the aid of tax-deductible contributions, whereas abortion rights groups cannot. This assertion does not constitute the type of direct personal injury that can support Article III standing.

An injury can confer standing only if it "fairly can be traced to the challenged action of the defendant, and not * * * [to] the independent action of some third party not before the court" and if it "is likely to be redressed by a favorable decision" (*Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 38, 41-42). Examination of the chain of causation here clearly indicates that the link between the challenged government action and plaintiffs' supposed disadvantaged status in the abortion controversy is too uncertain to support standing. As was the case in *Eastern Kentucky* (see 426 U.S. at 42-43), it is purely

abortion, are "denigrated" by the tax-exempt status accorded to the Roman Catholic Church is indistinguishable from the assertion of "stigmatic" injury that this Court rejected as a basis for standing in *Allen v. Wright*, 468 U.S. at 754-756. Plainly, the plaintiffs' ability to minister to their congregations is not adversely affected by the challenged government conduct and would not be enhanced at all if the plaintiffs were to receive the relief they seek. If the district court's view were correct, any litigant could defeat the Article III limitations merely by asserting what cannot be disproved—that he suffers "denigration" as a result of the challenged action. See *Valley Forge*, 454 U.S. at 485-486.

speculative whether contributors to the Roman Catholic Church base their donation decisions in any significant way upon the tax implications of their contributions. And there is no basis for predicting how, if at all, a change in contribution level would affect the Church's alleged political activity. Moreover, in order to help respondents' cause, the relief requested would have to influence not only the conduct of the Church and its contributors, but also the decisions of voters. See *Wimpisinger v. Watson*, 628 F.2d 133, 138-139 (D.C. Cir.), cert. denied, 446 U.S. 929 (1980) (Kennedy supporters lack standing to challenge allegedly illegal expenditure of government funds to benefit Carter campaign). In short, the improvement of the plaintiffs' position in the abortion controversy depends upon the independent actions of numerous third persons not before the district court. Thus, the injury they allege is neither fairly traceable to the challenged government action nor likely to be redressed by the relief they seek (see *Allen*, 468 U.S. at 758).⁷

3. Quite apart from the fact that the plaintiffs' suit fails to meet the constitutional prerequisites for federal court jurisdiction, it is manifest that the plaintiffs lack standing under the prudential limitations on standing that have been identified by this Court. As in *Allen v. Wright*, *supra*, respondents seek to compel the Executive Branch to undertake a nationwide review of the activities of a tax-exempt organization in order to determine whether it continues to qualify for exemption. But suits challenging an Executive agency's enforcement program, even when "premised on allegations of instances of violations of

⁷ See also *American Society of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), cert. denied, 435 U.S. 947 (1978) (no "competitor" standing to challenge tax exemption of another); *Keane v. Baker*, Civ. No. 86-588E (W.D.N.Y. Mar. 6, 1987) (no "voter standing" to challenge tax exemption of organization allegedly engaged in political activities on behalf of a candidate).

law," are "rarely if ever appropriate for federal-court adjudication" (468 U.S. at 759-760). In the absence of an assertion of concrete and remediable injury directly attributable to unlawful government conduct, the courts do not assume the "amorphous [task of] general supervision of the operations of government" (*United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring)), nor act "as virtually continuing monitors of the wisdom and soundness of Executive action" (*Laird v. Tatum*, 408 U.S. 1, 15 (1972)). And, as the Court recently emphasized in another context, a suit to compel an agency to undertake a specific enforcement inquiry is particularly unsuitable for judicial resolution because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise" (*Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

The administration of the tax laws presents a particularly strong case for refusal by the courts to hear a claim like that being pressed by the plaintiffs because such a claim intrudes into a detailed structure erected by Congress to govern tax enforcement. Congress has delegated "the administration and enforcement of" the tax laws exclusively to the Secretary and the Commissioner (I.R.C. § 7801(a)), including the power to "prescribe all needful rules and regulations for the enforcement of" those laws (I.R.C. § 7805(a)). Congress has reserved to itself the task of overseeing the enforcement of the revenue laws by creating a Joint Committee on Taxation to investigate the administration, operation, and effects of the tax system (I.R.C. §§ 8001-8023). At the same time, Congress has established precisely-defined channels for the adjudication of tax disputes initiated by private parties—proceedings in the Tax Court to redetermine deficiencies (I.R.C. §§ 6212, 6213), refund or collection actions in the district courts or the Claims Court (I.R.C. §§ 6532, 7422; 28 U.S.C. 1346,

1491), and, in limited circumstances, declaratory judgment actions, *e.g.*, by an organization seeking recognition of its own tax-exempt status under Section 501(c)(3) (I.R.C. § 7428). Apart from these avenues of relief, Congress has precluded "any person, whether or not such person is the person against whom such tax was assessed," from maintaining a "suit for the purpose of restraining the assessment or collection of any tax" (I.R.C. § 7421(a)), and has barred declaratory relief in all actions "with respect to Federal taxes" (28 U.S.C. (& Supp. III) 2201). This structure reflects a deliberate judgment that the vigor of the government's enforcement of the tax laws is generally not a matter for litigation instituted by private parties. In particular, Congress has determined that the invoking of judicial examination of the validity of a particular organization's tax exemption is the prerogative only of the government and the organization in question, not of third parties.

The specifics of this case graphically illustrate the mischief that would flow from conferring standing on persons such as the plaintiffs to challenge the tax exemption of a third party. At the behest of a litigant who is not directly affected, the district court is poised to conduct a nationwide review of the IRS's administration and enforcement of Section 501(c)(3), an inquiry that will intrude into the sensitive internal workings of both the government and the Roman Catholic Church. The Church includes many thousands of organizations across the country—parishes, dioceses, schools, hospitals, and others—that, for administrative purposes, fall under the "umbrella" exemption given to the USCC. The plaintiffs would have the district court substitute its judgment for the enforcement judgment of the IRS by reviewing the internal affairs of a multitude of those entities to determine whether they engage in more political activity than their

status under Section 501(c)(3) permits. Moreover, this inquiry would likely touch upon confidential tax return information collected by the IRS and result in constitutional controversy over efforts to obtain Church documents and to take testimony from Church officials. Such a judicial undertaking cannot properly be required, or justified, on behalf of litigants whose own tax liability is unaffected by the administrative action they seek to challenge.

Indeed, this lawsuit well illustrates the concern expressed by this Court over cases raising "questions of broad social import where no individual rights would be vindicated" (*Gladstone, Realtors v. Village of Bellwood*, 441 U.S. at 100). As an outgrowth of a debate over issues of social policy, the plaintiffs seek a declaration that the government has violated the law in failing to revoke the Church's tax exemption and an order directing the government to revoke the Church's tax exemption and to assess and collect back taxes due as a result of the revocation (C.A. App. 22-23). As a practical matter, however, the plaintiffs cannot obtain any such relief in this lawsuit, even if they prevail entirely on all their contentions on the merits. The Church was long ago dismissed as a party from this suit. If the district court were to enter an order directing the federal defendants to withdraw the Church's tax exemption and to assess back taxes, the Church would remain free to challenge the revocation in a declaratory judgment action under Section 7428 of the Code, or to challenge in normal fashion any deficiency asserted, either by filing a petition in the Tax Court or by filing a refund suit in district court. Because the Church is not a party to the underlying litigation here, the district court's decision would have no res judicata or collateral estoppel effect in later litigation. Thus, far from ending the matter, a ruling here in the plaintiffs' favor would not resolve the validity of the Church's tax exemption; it would only act as a catalyst to further litigation in another forum.

In sum, the plaintiffs in this suit are essentially seeking to exercise control over the Executive Branch's allocation of its law enforcement responsibilities, not to obtain a binding resolution of a specific legal question in which they have a cognizable interest. As this Court stated in *Allen*, "[r]ecognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders'" (468 U.S. at 756, quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)). This Court has made clear that litigants may not resort to the federal courts for such a purpose, and it is appropriate for the Court to intervene here to put a halt to this unwarranted judicial intrusion into executive functions.⁸

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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OCTOBER 1987

⁸ Moreover, permitting the present case to proceed to trial would encourage similar suits by third parties dissatisfied with the tax treatment of other groups with whose views they disagree. Even if such suits would ultimately fail on the merits, they could be used for purposes of securing information through discovery for utilization in public debate, as well as a means of turning the courts themselves into fora for policy debate rather than adjudicative tribunals.

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No. 87-416

Supreme Court, U.S.

FILED

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F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
October Term, 1987

UNITED STATES CATHOLIC CONFERENCE
and
NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Petitioners,

against

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Respondents.

On a Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a non-party witness, on the appeal of a civil contempt order, can challenge plaintiffs' standing to sue in the underlying lawsuit.

2. If so, whether respondents have standing as voters and clergy members to challenge the government's unconstitutional and unlawful enforcement of a provision of the Internal Revenue Code.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 87-416

UNITED STATES CATHOLIC CONFERENCE
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NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Petitioners,

- against -

ABORTION RIGHTS MOBILIZATION, INC.,
et al.,

Respondents.

*On a Petition for a Writ of Certiorari to
the United States Court of Appeals for
the Second Circuit*

RESPONDENTS' BRIEF IN OPPOSITION

For nearly two hundred years, the rule against interlocutory appeals has been a mainstay of the federal judiciary. Except in certain carefully defined circumstances, interlocutory orders -- even those relating to the trial court's jurisdiction -- cannot be appealed until after the entry of final judgment.

Petitioners below urged the Court of Appeals to create a new exception to the rule, an exception so broad that it would threaten the rule itself. The Court of Appeals, relying upon a 1919 decision of this Court and settled principles of appellate jurisdiction, declined to adopt the novel theory advanced by petitioners.

This Court should do the same. Petitioners have shown no valid reason for abandoning seventy years of precedent and two hundred years of judicial history to embark upon an entirely new and unwarranted course.

Statement of the Case

The petition seeks relief from a District Court order holding in contempt two non-party witnesses who have refused for more than four and one-half years to produce documents relevant to this action, in open defiance of two subpoenas and four orders of the trial court.

The witnesses, petitioners United States Catholic Conference ("USCC") and National Conference of Catholic Bishops ("NCCB"), do not dispute that they are in contempt. Nor do they make any arguments addressed to the nature or scope of the subpoenas or court orders themselves (such as suggesting that they are burdensome or implicate constitutional or other privileges).

Instead, the only issue petitioners raise is that the District Court erred in its 1982 and 1985 decisions denying motions to dismiss the action for plaintiffs' alleged lack of standing to sue. Petitioners, in other words, are attempting to appeal interlocutory orders of the trial court prior to the entry of final judgment. The Court of Appeals rightly rejected this unprecedented effort and this Court should also.

The underlying action challenges the constitutionality of the federal government's enforcement of the provision of § 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), which prohibits tax-exempt religious, charitable and other organizations from

participat[ing] in, or interven[ing] in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.¹

The amended complaint charges that the defendants, the Secretary of the Treasury and the Commissioner of Internal Revenue, (referred to herein as "the government" or "the federal respondents") have exempted the Roman Catholic Church in the United States ("the Church" or

¹/The tax code bestows many benefits on religious or other charitable organizations qualified under Section 501(c)(3). The two most important are that the organization itself is exempt from income tax and donations to the organization are deductible on the donor's tax returns. 26 U.S.C. § 170.

"the Catholic Church") from the strictures of this statute and have allowed the Church -- but not respondents (the plaintiffs below) -- regularly and persistently to intervene in political campaigns for public office to support or oppose candidates according to their views on abortion.²

The amended complaint alleges, in brief, that the Catholic Church, in violation of the clear language and intent of the anti-electioneering provision of § 501(c)(3), has engaged in a nationwide, persistent and regular pattern of intervening in elections in favor of candidates who support the Church's position on abortion and in opposition to candidates with opposing views. The government, according to the amended complaint,

²/Respondents have not made any allegations about the lobbying activities of the Catholic Church, or the government's enforcement of Internal Revenue Code provisions concerning lobbying.

despite its knowledge of these activities, has done nothing to enforce the law against the Church. The Internal Revenue Service has not revoked the tax-exempt status of the Church, or any of its constituent parts, and has not taken any appropriate preventive or prosecutorial measures to redress these violations of law. (C.A.App.7-23)³

By thus exempting the Catholic Church from the tax code, the government has granted the Church the equivalent of a subsidy of its partisan political activity -- a subsidy denied to respondents.⁴ This favoritism towards the Catholic

3/Reference to " a" is to the appendix to the petition for a writ of certiorari. Reference to "C.A.App. " is to the appendix in the Court of Appeals.

4/"Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization" *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544 (1983).

Church violates respondents' rights under the Establishment Clause of the First Amendment, and entitles respondents, among other things, to an injunction requiring the Internal Revenue Service to take appropriate enforcement action against the Catholic Church.

After the amended complaint was filed in January 1981, defendants (which then included the USCC and the NCCB) moved to dismiss the amended complaint on the ground that plaintiffs lacked standing to sue, and for other reasons. (C.A.App.24) In its July 1982 opinion deciding the motion (54a-92a), the District Court for the Southern District of New York upheld the standing of twenty-four plaintiffs as clergy members, voters and organizations whose members are voters, to assert certain claims against the government. (55a-79a, 91a)⁵

⁵/The District Court dismissed the amended complaint in its entirety [Footnote 5 continued on next page]

The government moved for certification of an interlocutory appeal of the District Court's decision under 28 U.S.C. § 1292(b). Although no longer parties, petitioners joined in that motion. (46a) The request was denied. Abortion Rights Mobilization, Inc. v. Regan, 552 F.Supp. 364 (S.D.N.Y. 1982).

Following that decision, in early 1983, the government and the respondents served separate deposition subpoenas duces tecum on the petitioners.⁶

[Footnote 5 continued from previous page] against the USCC and the NCCB for failure to state a claim against those two bodies. (83a-84a) The District Court also dismissed five plaintiffs, all health care facilities offering abortions, for lack of standing. (67a, 91a) Three more plaintiffs were subsequently dismissed by stipulation of the parties in March 1986. Fed. R. Civ. P. 41(a). Twenty-one plaintiffs (the respondents in this Court) remain.

6/It is undisputed that the documents called for by respondents' subpoenas are relevant to the subject matter of this action. The requests fall into several categories: the adoption and implementation of the portion of petitioners' 1975 Pastoral Plan for

[Footnote 6 continued on next page]

Petitioners responded by moving to quash the subpoenas in the Southern District of New York. The motion was denied and production ordered on April 3, 1984. (C.A.App.222) No discovery was had, however, as petitioners refused to produce any documents until after this Court's decision in Allen v. Wright, which was then pending. (46a)

After Allen was decided, 468 U.S. 737 (1984), the government renewed its

[Footnote 6 continued from previous page]
Pro-Life Activities dealing with political activities; identity of various Catholic officials, such as the names of the bishops or archbishops of certain dioceses and the directors of various state Catholic conferences and pro-life activities committees; financial support for and other contact with political candidates and certain identified "right to life" committees; and communications with the IRS and others concerning the Catholic Church's tax-exempt status and its compliance with the anti-electioneering provisions of § 501(c)(3). (C.A.App.160-79, 315-32)

The governments' subpoenas are reproduced at C.A.App.150-59 and C.A.App.529-33. The government has apparently done nothing to secure compliance with its subpoenas.

motion to dismiss for lack of standing. Petitioners submitted an amici brief in support of government's position. The District Court denied the motion in February 1985 (93a-102a), and again denied certification. (C.A.App.243-46)

In the summer of 1985 -- more than two years after the service of the subpoenas -- as petitioners had still not produced any documents, respondents moved to hold them in contempt. (C.A.App.232) Petitioners countered with a motion for a protective order, and the trial court held a pre-trial conference. (C.A.App. 238) In their motion papers and at the July 12, 1985 conference, petitioners expressed concern about the scope of the subpoenas under the First Amendment and asked for a further delay of production pending the filing of the government's anticipated petition for mandamus. (C.A.App.238-50)

The District Court carefully reviewed the subpoenas and, in its September 5, 1985 order, found that two requests "could conceivably trench on First Amendment considerations." (48a; C.A.App.251) The Court held that no documents need be produced under those two requests until narrowed by respondents to the satisfaction of either petitioners or the Court.⁷ The District Court denied the other objections raised by petitioners and "ordered [them] to comply with the subpoena forthwith." (48a; C.A.App.252)⁸

Petitioners continued to refuse to produce any documents. As the govern-

7/These two sections of the subpoenas, calling for minutes of internal church meetings, have been withdrawn by respondents in light of the District Court's order.

8/Respondents' motion for contempt was denied without prejudice to renewal "[i]n the event that there is a continued refusal or failure to obey the court's order." (C.A.App.252)

ment's mandamus petition had been filed in the Court of Appeals by the time the October 1985 conference was held, the District Court acceded to petitioners' request for more time, postponing production pending the decision on the petition. (49a; C.A.App.259-60) (Petitioners also submitted an amici brief in support of the government's petition.)

Throughout this waiting game, petitioners held out the hope -- falsely, the District Court found (47a-49a) -- that if the government's appellate efforts were unsuccessful, they would produce the requested documents. Consistent with this attitude, petitioners raised additional objections to the subpoenas in countering respondents' renewed contempt motion in October 1985. (C.A.App.287-88) At yet another pre-trial conference held on October 25, 1985, the District Court resolved petitioners' remaining objections to the subpoenas and ordered the

participants to attempt to agree on a protective order to protect any confidential documents. (48a-49a)⁹

The government's mandamus petition was denied by the Court of Appeals, without opinion, on January 14, 1986. In re Baker, 788 F.2d 3 (2d Cir. 1986) (table). The petition for rehearing was denied on March 3, 1986. (C.A.App.281)

On February 26, 1986, the District Court ordered document production to take place on March 7. (49a; C.A.App.280) Despite the Second Circuit's refusal to disturb the District Court's decisions on standing, despite the surgery performed on the subpoenas by the District Court to met petitioners' objections, and despite the negotiation and entry of a confidentiality order agreed to by petitioners,

⁹/As directed, the parties to the action and petitioners agreed upon a confidentiality order which was entered by the District Court on February 4, 1986. (C.A.App.268-76)

petitioners still refused to produce any documents. On March 6, petitioners announced to the District Court and to the press (C.A.App.289, 373-74) that they would not comply with the order.

But this time, the District Court's patience with petitioners had reached its limit. In its May 8 and 9, 1986 orders -- the orders which are the subject of this petition -- the District Court held petitioners in contempt for willfully refusing to produce documents. The Court found that petitioners "did more than fail to be forthright with the court. They began to engage the court and the plaintiffs in a series of maneuvers that -- given [petitioners'] apparent intention of ultimate non-compliance -- made a game of the judicial process." (47a)

Concluding that petitioners had "wilfully misled the Court and the plaintiffs and ha[d] made a travesty of the court process" (44a-45a), the District

Court imposed sanctions of \$50,000 a day on each entity until the documents were produced, and awarded respondents attorneys fees. (51a-53a)¹⁰

Petitioners appealed to the Court of Appeals for the Second Circuit, which affirmed the contempt order of the District Court. Relying on the rule against interlocutory appeals and this Court's decision in Blair v. United States, 250 U.S. 273 (1919), Judge Newman, writing for the majority, held that (10a):

Blair stands for the proposition that a witness has more limited standing. Though the contempt adjudication of the witness is final and hence appealable, that appeal brings up for review only issues in which the witness is legally "interested," Blair v. United States, supra. Doubtless, these would include any issue that con-

¹⁰/The fine was stayed by the District Court (52a-53a) and the stay has been extended by the Court of Appeals pending the determination of this petition. (105a-110a)

At the May 9, 1986 hearing on petitioners' application for a stay, Judge Carter stated that the fine would be paid to the United States Treasury and not respondents.

cerns the witness personally, such as the district court's personal jurisdiction over the witness,... or any privilege the witness may have to resist divulging the information sought.... With respect to jurisdiction over the underlying action, however, Blair instructs that the witness may make only the limited challenge as to whether there exists a colorable basis for exercising subject matter jurisdiction, and not a full-scale challenge to the correctness of the district court's exercise of such jurisdiction.

After reviewing the allegations supporting respondents' standing, the majority concluded that "the District Court cannot be said to be usurping power in determining that subject matter jurisdiction exists" (19a).

Judge Cardamone dissented, arguing:

Since a federal court's power to issue discovery and civil contempt orders derives from and necessarily depends on its jurisdictional power to hear the underlying action before it, I would hold that these witnesses are entitled on this appeal to challenge the district court's subject matter jurisdiction....

(21a)¹¹

¹¹/Although Judge Cardamone dissented from the judgment of the Court of [Footnote 11 continued on next page]

As was the case in the Court of Appeals, petitioners' arguments in this Court are a reprise of the government's earlier petitions to the Court of Appeals and this Court.¹² Petitioners do not deny that they are in contempt and do not

[Footnote 11 continued from previous page] Appeals, his opinion addressed only the scope of appellate review and did not discuss whether respondents actually had standing.

Judge Kearse concurred in the majority opinion and added an additional ground for it: discovery is appropriate to assist in gathering proof on the question of plaintiffs' standing.

12/The government, as previously noted, filed a petition for a writ of mandamus to the Court of Appeals which was denied in January 1986, prior to the entry of the contempt order. In re Baker, supra. After the contempt order, the government filed petitions for a writ of certiorari (No. 86-157) and for a writ of mandamus or prohibition (No. 86-162) in this Court for the same relief the government had sought in the Court of Appeals -- the reversal of the District Court's interlocutory decisions upholding respondents' standing to sue. The Court denied both petitions. (Orders of October 6, 1986)

raise any objections to the subpoenas or District Court orders themselves.¹³

The sole ground advanced by petitioners in the Court of Appeals and in this Court is that since respondents do not have standing to bring the lawsuit the District Court does not have subject matter jurisdiction to entertain the action. (3a) The Court of Appeals affirmed the District Court and denied petitioner's appeal. This Court should do the same.

¹³/Petitioners did seek, unsuccessfully, in the Court of Appeals to reverse the lower court's award of attorneys fees, but have not raised that issue in this Court.

REASONS FOR DENYING THE PETITION

- 1. Petitioners, As Non-Party Witnesses, Cannot Appeal The District Court's Interlocutory Decisions Denying Motions to Dismiss the Underlying Action.**

This petition presents an unprecedented attempt by a non-party witness to excuse its admitted refusal to comply with a court order on grounds completely unrelated to the propriety of the order. Unable to challenge the order's nature or scope, petitioners mount a collateral attack on the District Court's jurisdiction to entertain the underlying action. In effect, petitioners seek to convert their appeal of the contempt order against them into an appeal of the District Court's prior refusal to dismiss the action against the government for lack of standing to sue.

Petitioners have not cited, and respondents have not found, a single case permitting such a collateral attack. On

the contrary, the relevant precedent squarely rejects petitioners' argument. As the Court of Appeals held, petitioners, as non-party witnesses, cannot mount a "full-scale challenge to the correctness of the district court's exercise of [subject matter] jurisdiction."

(10a) A district court's denial of a motion to dismiss is not appealable, by parties or non-parties, and the result is not changed merely because the would-be appellants happen to be in contempt of a court order enforcing a subpoena.

There is no rule more fundamental to federal appellate practice than the one limiting appeals from the District Court to final orders and decrees. It is "the dominant rule in federal appellate practice," DiBella v. United States, 369 U.S. 121, 126 (1962), reflecting far more than "merely technical conceptions of 'finality.'... It is [a policy] against piecemeal litigation." Catlin v. United

States, 324 U.S. 229, 233-34 (1945). As this Court has held:

Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.

Cobbledick v. United States, 309 U.S. 323, 325 (1940).

That the interlocutory order upholds the trial court's subject matter jurisdiction does not affect the order's appealability. Jurisdictional motions are treated like any other motion. Catlin v. United States, 324 U.S. at 233 (petitioners claimed that "the court acquired no jurisdiction of the cause or to enter the order").

Civil contempt orders, it is true, are appealable by the non-party contemnor without waiting for a final judgment in

the main action, United States v. Ryan, 402 U.S. 530 (1971), but the reasons for this exception to the final judgment rule also delimit its scope.

An immediate appeal is permitted because the order is in effect final as to the contemnor and because the contempt proceeding is entirely collateral to the main action, allowing the appeal to proceed without unduly interfering with either the final judgment rule or the progress of the underlying lawsuit.

International Business Machines Corp. v. United States, 493 F.2d 112, 115 n.1 (2d Cir.), cert. denied, 416 U.S. 995 (1974); cf. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). These considerations plainly do not justify extending the exception to appeals, by parties or non-parties, of the district court's rulings on the sufficiency of the complaint.

Not only is the case law consistent in refusing to entertain interlocutory appeals of jurisdictional orders, it has long been clear that a recalcitrant witness cannot excuse a refusal to give evidence by challenging the jurisdiction of the court. This Court so held nearly seventy years ago in rejecting a witness' challenge to the jurisdiction of a court and grand jury over the subject matter of the inquiry:

[I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned ... The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government ..., is subject to to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself ...; some confidential matters are shielded, from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.

But, aside from exceptions and qualifications, -- and none such is asserted in the present case, -- the witness is bound not only to attend, but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.

He is not entitled to urge objections of incompetence or irrelevancy, such as a party might raise, for this is no concern of his ...

On familiar principles, he is not entitled to challenge the authority of the court or of the grand jury, provided they have a de facto existence and organization.

... In truth it is, in the ordinary case, no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not.

Blair v. United States, 250 U.S. 273, 281-83 (1919) (citations omitted; emphasis added). As the Court of Appeals correctly held, Blair is controlling here and requires the rejection of petitioners' appeal.

Petitioners seek to distinguish Blair on the ground that the court's order in that case was issued pursuant to a grand jury investigation, which is not

subject to Article III limitations. But Blair does not rest on the broad investigatory powers of a grand jury. It holds, rather, that a witness is not entitled to challenge the underlying jurisdiction of the court to issue the order compelling testimony because the jurisdictional questions are of "no concern" to him. 250 U.S. at 283.¹⁴

What Blair teaches, in other words, is that a witness seeking to excuse his noncompliance with a subpoena is confined to such matters as privilege or other "special reasons" affecting him individually in his status as a witness.¹⁵

14/Compare Federal Trade Commission v. Ernstthal, 607 F.2d 488, 491 (D.C. Cir. 1979) (FTC's jurisdiction "of no interest" to nonparty appellants); cf. Fein v. Numex Corp., 92 F.R.D. 94, 97 (S.D.N.Y. 1981) (nonparty witness seeking to quash subpoena cannot assert insufficiency of pleadings).

15/Of course, if the subpoena is issued under authority of a particular statute, the witness may argue that the statute does not apply. See, e.g., United States v. Thompson, 319 [Footnote 15 continued on next page]

That the giving of testimony or the production of documents may be "onerous at times," 250 U.S. at 281, does not entitle the witness to raise issues that relate solely to the underlying action. The residual, unavoidable inconvenience of appearing and testifying is the consequence of a "public duty, which every person within the jurisdiction of the Government is bound to perform when properly summoned." United States v. Bryan, 339 U.S. 323, 331 (1950) (citing Blair).

Of course the inconvenience suffered by a witness cannot be undone by a reversal on appeal. But the same is true of the much greater burden borne by the defendant in the same case, and that burden has consistently been rejected as a basis for allowing an appeal from a

[Footnote 15 continued from previous page]
F.2d 665 (2d Cir. 1963) (Walsh Act does not authorize issuance of a grand jury subpoena to a witness outside the United States.)

non-final order. Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980); Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383 (1953). Such costs to both witness and defendant are unavoidable consequences of the rule against interlocutory appeals but they do not constitute the kind of irreparable injury that creates finality and standing to appeal.¹⁶

The principle announced in Blair is not affected by whether the issue that the witness seeks to raise is "jurisdictional." That was the case in Blair itself, and none of the cases cited by

¹⁶/Maness v. Meyers, 419 U.S. 449 (1975), cited by petitioners (Pet. 12, n. 12), is not to the contrary. In that case the appellant asserted a Fifth Amendment privilege, which the Court found might be irreparably compromised by compliance. 419 U.S. at 462 n. 10 and accompanying text. Petitioners here, while claiming "real injuries" that might flow from compliance (Pet. 12), identify none and assert no constitutional or other privilege against producing the subpoenaed documents.

petitioners holds otherwise. The statements in those cases, noting the duty of every federal court to examine its jurisdiction, are all implicitly, but necessarily, qualified by the requirements of orderly judicial process. Nothing in United States v. United Mine Workers, 330 U.S. 258 (1947), or United States v. Morton Salt, 338 U.S. 632 (1950), or any other case petitioners cite, suggests that the ordinary rules governing appellate procedures, such as the rule against interlocutory appeals, can be cast aside merely because a litigant seeks to raise a jurisdictional issue.¹⁷

¹⁷/Petitioners quote language (Pet. 14) from United States v. United Mine Workers to the effect that a civil litigant may not profit from a fine imposed by a contempt order later set aside. 330 U.S. at 294-95. As the Court of Appeals noted, however, the ultimate disposition of the fine is not at issue here (14a-15a), and respondents, in any event, are unlikely to not profit from the fine, as Judge Carter has said that the fine is to be paid into the United States Treasury. See n. 10, supra.
[Footnote 17 continued on next page]

Certainly it is not the case, as petitioners appear to argue, that an appellate court is bound to consider any and every challenge to the subject matter jurisdiction of the district court that is brought to the appellate court's attention. As previously noted, the denial of a motion to dismiss, for example, is not appealable, even if the issue is subject matter jurisdiction. Catlin v. United States, 324 U.S. 229 (1945).

Similarly, a petition for a writ of mandamus or prohibition raising jurisdictional issues is treated like any other petition for an extraordinary writ. No special rules apply:

[Footnote 17 continued from previous page]

Nor is it a valid criticism, as petitioners contend (Pet. 17), that no court prior to this case has had occasion to apply Blair to an appeal from a contempt order in a civil action. Quite the contrary. That the issue has never arisen before now is an striking indication of the novelty of petitioners' theory and its

[Footnote 17 continued on next page]

[A]ppellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal.

Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1942). Only if the action of the lower court amounts to "a usurpation of power" is mandamus appropriate. Pfizer, Inc. v. Lord, 522 F.2d 612, 615 (8th Cir. 1975), cert. denied sub. nom. Government of India v. Pfizer, 424 U.S. 950 (1976).¹⁸

[Footnote 17 continued from previous page]
fundamental conflict with settled principles.

¹⁸/See, e.g., American Airlines, Inc. v. Forman, 204 F.2d 230, 232 (3rd Cir.), cert. denied, 349 U.S. 806 (1953) ("If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus or prohibition even though on normal appeal a reviewing court might find reversible error"); American Fidelity Fire Insurance Co. v. United States District Court, 538 F.2d 1371, 1375 (9th Cir. 1976) ("While we might well decide the case differently if it were before us on appeal, we cannot conclude that there is no rational and substantial legal argument in support of the district court's decision."); Formica Corp. v. Lefkowitz, 590 F.2d [Footnote 18 continued on next page]

One case on which petitioners place particular emphasis, Bender v. Williamsport Area School Dist., 106 S.Ct. 1326 (1986), is highly instructive, but it offers no comfort to petitioners. According to Bender, "[o]n every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes" 106 S.Ct. at 1334 (emphasis added). Bender does not establish the automatic appealability of any challenge to the jurisdiction of district court; it teaches, rather, that the threshold issue in any appeal is appellate jurisdiction - what can be properly raised before the appellate court.

[Footnote 18 continued from previous page]
915, 920-22 (C.C.P.A.), cert. denied,
442 U.S. 917 (1979) (dismissing
petition to review lower court
decision upholding plaintiff's
standing to sue).

Surely petitioners do not mean to suggest that the result in Bender would have been different, that the would-be appellant would have had standing to appeal the District Court's decision, if the grounds for his appeal had not been that the District Court decided the merits incorrectly, but that the trial court lacked subject matter jurisdiction. Yet that, in substance, is their position here. Petitioners' appeal has nothing whatever to do with the contempt order. It is addressed solely to the issue of the subject matter jurisdiction of the underlying action.

To permit collateral attacks on jurisdiction by non-party witnesses would have devastating consequences on the ability of the district courts to enforce their orders and to manage the flow of litigation. At any time a lawsuit could come to an abrupt halt, simply because a non-party witness alleged a defect in the

court's jurisdiction. Since the witness would not be bound by any prior ruling on the subject, that the district court had already examined its jurisdiction would count for naught.

If a subpoena were issued by a district court other than the one in which the action was pending, the witness could insist that his challenge be ruled on by the issuing court, Fed. R. Civ. P. 45(d), raising the possibility of inconsistent jurisdictional rulings by district courts or even by courts of appeals in the same case.¹⁹ In any case that presented a

¹⁹/The subpoenas in the instant case, for example, were issued by the District Court for the District of Columbia (C.A.App.315,325), where petitioners are headquartered. Petitioners chose to keep the proceedings in the Southern District of New York where the action is pending by moving in that District for a protective order. Fed. R. Civ. P. 26(c). Had they chosen instead to serve objections to the subpoena under Rule 45(d)(1), a motion to compel could only have been brought in the District of Columbia, id., and an appeal from any ensuing order of contempt could only have been [Footnote 19 continued on next page]

close question as to subject matter jurisdiction, no party could be sure of his ability to obtain evidence by subpoena -- and no trial court could be sure of its ability to proceed to trial -- until this Court had ruled.

Petitioners' argument threatens to undermine entirely the rule against interlocutory appeals. Its adoption would be an open invitation to collusion between parties and friendly non-party witnesses to secure expedited review of jurisdictional rulings -- or other issues that would result in dismissal of the case.²⁰

[Footnote 19 continued from previous page]
brought in the District of Columbia Court of Appeals. In re Corrugated Antitrust Litigation, 620 F.2d 1086 (5th Cir. 1980).

/ 20/While petitioners naturally focus on the example of a jurisdictional challenge, they nowhere explain why a witness should be limited to appealing only jurisdictional questions. If a witness has standing to attack a complaint by virtue of the witness' purported interest in not being

[Footnote 20 continued on next page]

Since civil contempt can be purged at any time by compliance, and the courts appear willing to grant stays of enforcement pending appeal, there would be no real risk to such disobedience. The result would be the serious disruption of orderly judicial processes and the end to the rule against interlocutory appeals.

Indeed, this case provides an excellent example of how the appeal from a contempt order can be used to circumvent the rule against interlocutory appeals. The federal respondents, with petitioners' support as amici in the District Court and the Court of Appeals, unsuccessfully attempted to obtain appellate

[Footnote 20 continued from previous page]
compelled to furnish evidence in a suit that should be dismissed, then there is no principled way to bar the witness from asserting any other defect that would warrant dismissal of the underlying action and render the witness' participation unnecessary.

review of the denial of the motions to dismiss.²¹

Now come petitioners -- with the government's support -- seeking the identical relief, plenary appellate review of interlocutory orders of the District Court. Indeed, the government in this proceeding has dropped all pretense of seeking anything else and argues in its brief that "the court of appeals, presented with the issue in a direct appeal that is not burdened by the restrictions that attend the issuance of an extraordinary writ, should have granted petitioners' request to vacate the contempt order because of lack of jurisdiction over the underlying lawsuit." (Fed. Resp. Br. 7)

²¹The government twice sought certification under 28 U.S.C. § 1292(b), and petitioned both in the Court of Appeals and this Court for a writ of mandamus.

To preserve the rule against interlocutory appeals, the Court of Appeals in this case wisely applied to the District Court's determination the same presumption of validity and minimal scrutiny appropriate to petitions for an extraordinary writ:

In the instant case, though the issue of subject matter jurisdiction over the underlying lawsuit is a substantial question, the *District Court cannot be said to be usurping power in determining that subject matter jurisdiction exists.*

(19a; emphasis added). Compare Pfizer, Inc. v. Lord, supra, 522 F.2d at 615.²²

The standard of review adopted by the Court of Appeals successfully reconciles jurisdictional concerns with the federal courts' strong policy against piecemeal appeals. It promotes consis-

²²/As Judge Newman observed, a similar standard is also applied to a collateral attack on a judgment entered after litigation of subject matter jurisdiction. (19a) See *Nemaizer v. Baker*, 793 F.2d 58, 64-66 (2d Cir. 1986) (Cardamone, J.).

tency and predictability. It is of a piece with history and precedent. It is, in a word, correct.

The instant petition and the appeal below are indistinguishable from the government's prior petitions for the same relief. While the USCC and NCCB are now petitioners instead of amici, their arguments and their interest in the case are unchanged. Like its predecessor, this petition for a writ of certiorari should be denied.

2. Respondents Have Standing

As shown in the previous section, petitioners cannot mount a "full-scale challenge to the correctness of the district court's exercise of [subject matter] jurisdiction." (10a) Since petitioners cannot appeal the District Court's refusal to dismiss the complaint for lack of standing, their attack on

that refusal is analogous to a petition for an extraordinary writ and, as the Court of Appeals recognized, should be judged by the standards appropriate to such a petition.

Under those standards, the petition should be denied. As the Court of Appeals held, "though the issue of subject matter jurisdiction over the underlying lawsuit is a substantial question, the District Court cannot be said to be usurping power in determining that" respondents have standing to sue. (19a)

Indeed, any other conclusion would appear to be foreclosed by this Court's refusal last Term to grant the government's petition for mandamus (No. 86-162) or to review the denial of mandamus by the Court of Appeals (No. 86-157). Although the identity of the petitioner has changed, the issue has not.

Should this Court choose to inquire more deeply into the merits of the Dis-

trict Court's decision, the result should be the same: the District Court properly sustained the standing of the clergy and "voter" respondents.

The prerequisites for standing have not been disputed by the parties or the District Court and can be fairly easily stated. Grounded in the "case or controversy" provisions of Article III of the Constitution, the standing doctrine requires a plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751 (1984). In addition, the plaintiff must satisfy the so-called "prudential" concerns, reflecting "judicially self-imposed limits on the exercise of federal jurisdiction." Id.

Petitioners and the federal respondents (referred to collectively in this section as "petitioners") argue that the

clergy respondents have failed to allege a cognizable injury under the Establishment Clause and that the injury alleged by the "voter" respondents is neither "fairly traceable" to the government's conduct nor "likely to be redressed by the requested relief." Petitioners also assert as grounds for dismissal the prudential limitation "barring adjudication of generalized grievances more appropriately addressed in the representative branches." 468 U.S. at 751. Petitioners' challenges are without merit.²³

²³/As the issue of standing was raised below on motions to dismiss the amended complaint, the Court is required to accept as true all the material allegations of the amended complaint (C.A.App.7-23) and the additional affidavits submitted by respondents in opposition to the motion (C.A.App.34-86), and to construe these facts in the light most favorable to the respondents. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 109 n.22, 112 (1979); Warth v. Seldin, 422 U.S. 490, 501 (1975).

A. The Clergy Respondents: To confer standing, a plaintiff's injury must be "'distinct and palpable,'" Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979), and cannot be "'abstract' or 'conjectural' or hypothetical,'" Allen v. Wright, 468 U.S. at 751. It does not, however, have to be economic.

In Allen v. Wright, this Court reaffirmed that "stigmatizing injury" is the "sort of noneconomic injury [which] is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing." 468 U.S. at 755, citing Heckler v. Mathews, 465 U.S. 728, 739-40 (1984) ("discrimination itself ... by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community;... can cause serious non-economic injuries").

The Court has specifically held that violation of a plaintiff's "spiritual stake in First Amendment values" is sufficient injury to confer standing, Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 154 (1970):

A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause. Abington School District v. Schempp, 374 U.S. 203.

Governmental discrimination among religions strikes at heart of the spiritual values the Establishment Clause was designed to protect by creating "an atmosphere of official denominational preference" that deprives the nonpreferred religions of "the liberty to exercise and propagate [their] beliefs." Larson v. Valente, 456 U.S. 228, 245 (1982). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Id. at 244.

Coercion is not a necessary element of a violation of the Establishment Clause. The injury is the discrimination itself. In the words of Justice Black:

The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.

Engel v. Vitale, 370 U.S. 421, 430 (1962). Thus, a violation of that Clause need not "include proof that [plaintiffs'] particular religious freedoms are infringed." Abington School District v. Schempp, 374 U.S. at 203, 224 n.9. (1963). It is sufficient that plaintiffs show that they are "directly affected by the laws and practices against which their complaints are directed." Id.

That requirement is clearly satisfied here. Unlike the plaintiffs in Valley Forge Christian College v.

Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982), the clergy respondents here do not rely on the abstract injury common to all citizens that results when the government acts illegally. Rather, clergy respondents suffer a distinct and concrete stigmatizing injury that satisfies the standards set forth by this Court.

The respondents are each clergy members of religious institutions and denominations that do not share the Catholic Church's theological abhorrence of abortion.²⁴ Their work is to practice and teach their particular religious beliefs. They are active in the abortion rights movement but under § 501(c)(3) must refrain from engaging in certain

²⁴/The clergy respondents are Rabbi Israel Margolies, Reverend Beatrice Blair, Rabbi Balfour Brickner, Reverend Robert Hare, Reverend Marvin G. Lutz, and the Women's Center for Reproductive Health which was founded by Reverend Lutz and is an extension of his ministry (C.A.App.64-67).

activities, such as speaking from the pulpit in support of candidates for public office, which they could otherwise employ to obtain greater public approval or acceptance for their teachings.²⁵

Catholic clergy on the other hand, according to the amended complaint, are subjected to no comparable restraint and may, while the same opportunity is denied to respondents, combine religion and partisan politics without jeopardizing their tax-exempt status. This governmental favoritism makes it more difficult for respondents, vis-a-vis their Catholic counterparts, to convey their message and beliefs to their congregants and the public. As the District Court found after reviewing the affidavits of the clergy respondents:

²⁵/Engaging in these prohibited activities would lead to the loss of tax-exempt status under § 501(c)(3), and make it more expensive and difficult for respondents and their congregations to carry on their religious missions.

The clergy plaintiffs have devoted their lives to religious communities and beliefs that are denigrated by government favoritism to a different theology. ... Tacit government endorsement of the Roman Catholic Church view of abortion hampers and frustrates these plaintiffs' ministries. The government need not silence these plaintiffs to cause discrete spiritual injury because official approval of an orthodoxy antithetical to their spiritual mission diminishes their position in the community, encumbers their calling in life, and obstructs their ability to communicate effectively their religious message.

(67a-68a) (footnote omitted).

Thus, unlike the plaintiffs in Allen v. Wright, who could not claim that they personally had been subjected to discrimination as a result of the government's policy, 468 U.S. at 746, respondents here are personally, directly affected in the daily exercise of their professional calling by the discriminatory governmental policy they challenge.

This difference is made even more apparent when one examines the second and

third elements of the standing test. In Allen, the Court held that plaintiffs' alternate ground for standing, that the government's actions had diminished their children's ability to attend racially integrated schools, was not "fairly traceable" to the challenged government conduct. The Court noted that it was "entirely speculative" whether a change in the government policy would increase the opportunity for respondents to attend integrated schools. 468 U.S. at 757, 758.

By contrast, the clergy respondents here are personally denied the opportunity to engage in partisan political activity and to foster their respective religious missions with the same official status and on the same statutory terms and conditions as another tax-exempt religious entity. This injury is caused solely by the government's discriminatory enforcement of the law -- by the federal

respondents' favoring one religion over others -- and can be readily redressed by a court order requiring the cessation of the offending practice. As the District Court found (69a, 96a):

[Respondents'] injury flows directly from the federal defendants' allowing the church defendants the privilege of retaining § 501(c)(3) status while electioneering and denying this privilege to other religious organizations. The granting of a uniquely favored tax status to one religious entity is an unequivocal statement of preference that gilds the image of that religion and tarnishes all others. A decree ordering the termination of this illegal practice and restoring all sects to equal footing will redress this injury.

Injunctive relief requiring the Internal Revenue Service to end the preferential treatment of the Catholic Church will redress respondents' injury. Thenceforth, respondents and their Catholic brethren would be treated equally by the government.²⁶

²⁶/Standing is not defeated simply because the challenged governmental activities are directed at persons
[Footnote 26 continued on next page]

Accordingly, the District Court's determination that the clergy respondents have standing to maintain this action is correct.

B. "Voter" Standing: The District Court held further that respondents who were voters, campaign contributors (C.A.App.38-45), a past and potential future candidate for public office (C.A.App.84) and a political party official (C.A.App.60) had standing to bring this action under a theory of "voter standing."²⁷

[Footnote 26 continued from previous page] other than the respondents. Such is almost always the case in Establishment Clause cases. See Engel v. Vitale, 370 U.S. at 438 (Douglas, J. concurring); Warth v. Seldin, 422 U.S. at 505 ("indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights").

27/In addition, three organization plaintiffs, Abortion Rights Mobilization, Inc., National Women's Health Network, Inc. and Long Island National Organization for Women - Nassau, Inc. were found to have standing on behalf of their members who are voters. (69a-
[Footnote 27 continued on next page]

The injury suffered by the "voter respondents" arises from the distortion of the political process caused by the government's subsidy of the partisan political activities of one participant in the political process, the Catholic Church, but not others, including the respondents.²⁸

[Footnote 27 continued from previous page]
70a) Of the twenty individual plaintiffs whose standing was upheld, seventeen remain in the case. N.5, supra.

28/ This Court has repeatedly recognized the constitutional "right to a vote free of arbitrary impairment by state action..." *Baker v. Carr*, 369 U.S. 186, 208 (1962), and of the standing of voters to challenge governmental action that "plac[es] them in a position of constitutionally unjustifiable inequality vis-a-vis [other] voters." 369 U.S. at 207. The government not only is prohibited from depriving individuals of their vote, but it also may not dilute the value of any vote. See, e.g., *White v. Weiser*, 412 U.S. 783 (1973); *Reynolds v. Sims*, 377 U.S. 533 (1964). See also *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C.Cir.), cert. denied, 464 U.S. 823 (1983); *O'Hair v. White*, 675 F.2d 680 (5th Cir. 1982) (en banc), and the cases cited by the District Court at 71a-74a, 98a.

The tax exemption for electioneering granted the Catholic Church by the federal respondents distorts the political process by subsidizing the Church's (and its contributors') political activities, while it denies respondents the same benefit. This diminishes the effectiveness of respondents' contributions to political candidates as compared to those of the Church and its donors.²⁹

Respondents are harmed further when the government permits the Catholic Church, but not respondents, to use the power and prestige arising from the Church's standing in the community to

²⁹/Since respondents' political contributions are not deductible, it costs respondents considerably more to give \$1,000 to a candidate, for example, than it costs a donor to make a similar contribution to a candidate by means of a donation to the Catholic Church. Candidates backed by the Church, therefore, can raise funds more easily than the respondents' candidates. Needless to say, the ability to raise funds has a substantial impact on the outcome of political campaigns.

partisan advantage, and to employ the Church's organization and membership structure to support or oppose political candidates. These advantages in the political process are denied respondents.

These injuries are caused, not by the partisan political activity of the Catholic Church, but by government action -- or, more accurately, inaction -- with respect to that political activity. Respondents' injuries can be eliminated by an order which requires the government to end its favoritism toward the Catholic Church, thus eliminating the government-caused distortion of the political process. If thereafter the Catholic Church continued to engage in partisan political activities, it would have to do so on the same basis as respondents -- that is, by foregoing its tax-exempt status and by financing such activities without tax-deductible dollars.

Respondents do not challenge the right of the Catholic Church to support candidates. They argue only that the government's support for and subsidy of Catholic Church electioneering activity is unlawful and unconstitutional. It is irrelevant, therefore, whether the Church will continue to be active politically or if its members will increase their donations. If the government applies to the Catholic Church the same standards regarding political use of tax-exempt, tax-deductible dollars as it applies to respondents, the governmentally-caused arbitrary inequality of which respondents complain will have been eliminated. See Heckler v. Mathews, 465 U.S. 728, 739 (1984).

Thus neither Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976), nor Allen v. Wright, 468 U.S. 3315 (1984), upon which petitioners rely, is on point. In Simon, plaintiffs'

alleged injury was their inability, as indigent patients, to obtain hospital services without charge. They could not show, however, that a change in the Internal Revenue Service regulations they challenged would result in a change in the hospitals' policies towards indigent patients, as those policies were determined by many factors, only one of which was before the Court. Since the hospitals were free to deny plaintiffs medical services regardless of how the IRS regulations were drawn, the Court held that the respondents could not meet the causation or redressability requirements for standing.

In Allen, plaintiffs' injury was the diminished ability to obtain racially-integrated schooling. Since plaintiffs could not show that a change in the Internal Revenue Service policy would alter the segregated schools' admissions policies, which were determined independently,

the line of causation between plaintiffs' injury and the challenged action was too attenuated to support standing.

In the case at bar, however, the injury to respondents is not the Catholic Church's political activities per se, but the government's subsidy of those activities. If that tax benefit is removed -- by an order requiring equal enforcement of the tax code -- the cause of respondents' injury will also be removed. As the District Court held (99a):

The judicially cognizable injury in Allen was segregated schooling which was neither created nor remediable by IRS action alone. The injury alleged in ARM is unequal footing in the political arena, a condition completely traceable and within the control of the IRS.

The decisions of the District Court upholding respondents' standing to sue,, far from being a departure from Simon and Allen, are a direct application of the principles for which they stand.

C. Prudential Concerns: Petitioners rely heavily on Allen v. Wright's analysis of the judicially-imposed prudential limitations on standing to argue against standing here. Such concerns do not defeat standing in this case.

Plaintiffs in Allen had requested nation-wide relief in the form of an injunction compelling the Internal Revenue Service to adopt a new system of rules and regulations concerning enforcement of the policy against tax support for segregated schools. The plaintiffs "[did] not challenge particular identified unlawful IRS actions," 468 U.S. at 766, but only made "general complaints about the way in which government goes about its business," id. at 760.³⁰

³⁰/The Court in Allen, stated, however, that its holding "[did] not rest on the more general proposition that no consequence of the allocation of administrative enforcement resources is judicially cognizable." 468 U.S. at 761 n.26.

By contrast, respondents here do not challenge a general regulatory scheme but rather allege serious infringements of their constitutional rights directly caused by specified unlawful conduct of the Internal Revenue Service -- namely, its discriminatory non-enforcement of a specific prohibition in the tax code against a persistent and well-publicized offender.³¹ As the District Court put it:

Plaintiffs do not seek resolution of "abstract questions;" they have articulated particular improper actions by the church defendants and illegal and unconstitutional disregard for that activity by the government defendants. Although the complaint implicates social policy issues, it does not call for judicial selection of an appropriate policy. Congress already has made that choice and set out the correct

³¹/Nor is there any ambiguity about the criteria to be applied. Section 501(c)(3) contains an absolute prohibition against partisan political activity by tax-exempt organizations. In writing this statute, Congress has spoken "[w]ith undeniable clarity." Bob Jones University v. United States, 461 U.S. 574, 613 (1983) (Rehnquist, J. dissenting).

policy in § 501(c)(3); plaintiffs ask only for a judicial determination of whether defendants have observed Congress's commands concerning paying taxes and engaging in political activity. The prudential barriers do not restrict a court from adjudicating such a claim merely because of the interplay between the litigation and social controversy.

(79a, 101a-102a).

This Court has repeatedly reaffirmed that the Constitution requires the judiciary to protect the fundamental rights of all citizens and that relief from infringements of those rights by the government cannot be left solely to the political process. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy ... and to establish them as legal principles to be applied by the courts." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943). The judiciary's proper role clearly extends to ensuring that administrative agencies do not violate

explicit Congressional directives when those violations infringe on fundamental constitutional rights.

To rely on prudential notions of separation of powers would be peculiarly inappropriate where, as here, the infringement involves specific administrative activity which distorts and "restricts those political processes which can ordinarily be expected to bring about [relief]..." United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

On the contrary, concern about the separation of powers militates in favor of invoking jurisdiction in this case, so as to prevent the tainting of the political process by specifically identified, unlawful and unconstitutional governmental action. As the Fifth Circuit held in a similar context:

We do not believe that prudential notions of self-restraint in the area of standing are properly invoked in cases involving the dilution

of an individual's fundamental voting rights: when a complaint alleges injury stemming from a clogged democratic process, it would be anomalous to require the plaintiff to seek relief from political institutions.

O'Hair v. White, 675 F.2d 680, 689 (5th Cir. 1982) (en banc).

Accordingly, the District Court's decisions on standing are eminently correct, and certainly cannot be said to constitute the usurpation of power. The District Court's rulings on standing are supported by rational and substantial arguments and should not be disturbed at this interlocutory stage by this Court.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari to the Court of Appeals should be denied.

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Dated: October 22, 1987

OCT 30 1987

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE

and

NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Petitioners,
v.

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

PETITIONERS' REPLY BRIEF

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-416

UNITED STATES CATHOLIC CONFERENCE

and

NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Petitioners,

v.

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

PETITIONERS' REPLY BRIEF

The main thrust of the Respondents' Brief in Opposition is that the Petition for a Writ of Certiorari should be denied because it seeks to create a broad exception to the general rule against interlocutory appeals. That argument reflects a total misconception of the issue in this case. This case does not involve an interlocutory order, and the issue has nothing to do with interlocutory appeals. The order under review is a final judgment of civil contempt, which was immediately appealable under well-established principles of appellate jurisdiction. *See United States v. Ryan*, 402 U.S. 530 (1971).

The issue in this case is not one of appellate jurisdiction. It is rather one of the district court's power under Article III of the Constitution—its power to adjudicate a challenge by private parties to the tax exempt status of the Catholic Church, its power to subpoena Church documents at the request of those parties, and its power to enforce such a subpoena through civil contempt.

1. Petitioners, the United States Catholic Conference and National Conference of Catholic Bishops ("USCC/NCCB"), have invoked the principle that a judicial subpoena may be issued, and civil contempt ordered, only to further the resolution of a case or controversy over which the court has power under Article III of the Constitution. It is true that in resisting the subpoenas and contempt motion on this ground, USCC/NCCB presented the same Article III standing argument that the federal defendants had asserted in arguing that the case should be dismissed. But that fact does not render the order of contempt "interlocutory." A civil contempt order is final, and it may be attacked on appeal on the same grounds upon which it may be resisted in the district court—including the ground that the district court lacked Article III power to act.

2. Respondents assert that the Article III standing issue "is addressed solely to [the court's underlying] subject matter jurisdiction" and "has nothing whatever to do with the contempt order." Brief in Opposition ("Opp.") 32. That assertion simply ignores the central question posed by this petition: whether the limitations imposed by Article III apply to a court's power to issue subpoenas and enforce them through civil contempt.

Article III standing, it bears emphasis, is not merely a facet of "subject matter jurisdiction," but a "requirement . . . derived directly from the Constitution." *Allen v. Wright*, 468 U.S. 737, 751 (1984). It thus marks the

outer boundary of a federal court's power. In *United States v. Morton Salt Co.*, 338 U.S. 632, 641-42 (1950), this Court stated unequivocally that the judicial power to issue and enforce subpoenas is dependent upon the existence of an Article III case or controversy. And in *United States v. United Mine Workers*, 330 U.S. 258 (1947), the Court stated that a civil contempt order cannot be sustained if the issuing court was without subject matter jurisdiction. It is the inconsistency between those pronouncements by this Court and the decision below that makes this case one of exceptional importance. Yet the respondents make no attempt to reconcile their position with *Morton Salt* and *United Mine Workers*. They note simply that those cases do not authorize interlocutory appeals, Opp. 28—a point which, although accurate, is irrelevant.

3. Respondents apparently take the position that although Article III power is necessary to decide a case, it is not necessary to preside over a case in its discovery stage, to issue subpoenas, or to impose penalties of civil contempt for noncompliance. There is nothing to support that position. Article III extends the "judicial Power" to cases and controversies, and the "judicial Power" includes not only the power to decide a case on the merits, but also the power to subpoena witnesses and hold them in contempt. There is simply no basis for removing the subpoena power and contempt power from the strictures of Article III. There are, in fact, compelling reasons to insist that the burdens of discovery and contempt not be imposed if the Constitution deprives the court of power to resolve the underlying dispute. The burdens and costs of discovery are often more significant from a practical standpoint than the actual outcome of a case. And in some cases—perhaps this is one—the desire to pursue discovery may be the principal reason for bringing a lawsuit in the first place. The burdens of contempt, as the \$100,000 daily fine in this case illustrates, can be

even greater. The sensible and just rule—and the rule suggested by *Morton Salt*—is that a court without Article III power to decide a matter is also without power to issue and enforce subpoenas that can only be justified by the need to prepare the matter for decision.

4. Like the panel majority, the respondents rely upon *Blair v. United States*, 250 U.S. 273 (1919). But *Blair* simply held that a grand jury witness may not challenge a subpoena on the ground that a statute that may have been violated was unconstitutional. In the 68 years since *Blair* was decided, it has never been cited for the proposition that a witness subpoenaed in a civil case is precluded from challenging the Article III power of the court to act. And, indeed, the rationale of *Blair* is wholly inapplicable to a case like this one.

First, as noted in the Petition, at 17, and the dissent below, A. 34a-36a, the judicial power, unlike the power of a grand jury, is limited by Article III. Second, judicial proceedings are conducted in an entirely different fashion. As the Court explained in *Blair*, “examination of witnesses by a grand jury need not be preceded by a formal charge.” 250 U.S. at 282. The “question whether the facts show a case within [the grand jury’s] jurisdiction” and, if so, the “precise nature of the offense . . . normally are developed at the conclusion of the grand jury’s labors, not at the beginning.” *Id.* at 282-83 (citation omitted). It is premature and speculative for a witness to anticipate these matters by raising a constitutional challenge to a statute that may or may not be invoked by the grand jury.

In contrast to a grand jury proceeding, a civil case is initiated by a formal complaint. The precise nature of the claim is stated at the beginning of the case, not at its conclusion. And in the ordinary case, it can be determined at the outset “whether the facts show a case within [the court’s] jurisdiction.” *Id.* at 283. Of course,

if the court’s jurisdiction cannot be determined at the outset, the court has power to order discovery to determine its jurisdiction. See Petition at 16. But when, as in this case, it can be determined at the outset whether the court has Article III power, there is nothing in *Blair* that bars the witness from raising the issue, or that disables the court from deciding it.

A recent decision of the United States Court of Appeals for the District of Columbia Circuit underscores the limited scope of *Blair*, even in the grand jury context. *In re Sealed Case*, 827 F.2d 776 (D.C. Cir. 1987) (*per curiam*). Distinguishing the “speculati[ve]” challenge asserted in *Blair*, the court held that a grand jury witness can defend against a grand jury subpoena and subsequent contempt charge by challenging the authority of the prosecutor to act. *Id.* at 779. Citing *United States v. Ryan*, 402 U.S. at 532, the court held that a witness has “just cause” to resist a subpoena as “unduly burdensome or otherwise unlawful” if its issuance was without lawful authority. 827 F.2d at 778. As the court noted, other courts have consistently permitted grand jury witnesses to resist subpoenas, and defend against contempt charges, by “mounting [a] challenge to the authority under which the subpoenas issued.” *Id.* See, e.g., *In re Perlín*, 589 F.2d 260 (7th Cir. 1978); *In re Subpoena of Persico*, 522 F.2d 41 (2d Cir. 1975); *DiGirlando v. United States*, 520 F.2d 372 (8th Cir.), *cert. denied*, 423 U.S. 1033 (1975). To the extent the panel majority in this case held that a subpoenaed party may not challenge the power of the issuing authority to act, that decision conflicts with *In re Sealed Case* and the other decisions upon which it relied.

The reliance of the panel majority and the respondents upon *Blair* in this case is, petitioners contend, entirely misplaced. If there is uncertainty about *Blair*’s meaning, however, then that in itself is an important reason for this Court to grant the petition. This Court has never

addressed the possible applicability of *Blair* to a judicial subpoena issued under the authority of Article III. At the very least, the extension of *Blair* to such a case is in tension with this Court's subsequent pronouncements in *United Mine Workers* and *Morton Salt Co.*, and is deserving of the Court's attention.

5. Respondents warn of "devastating consequences on the ability of the district courts . . . to manage the flow of litigation," if witnesses can challenge the power of the court to issue subpoenas. Opp. 32. Intolerable delays will result, they argue, and witnesses will necessarily be free to "assert[] any other defect that would warrant dismissal of the underlying action." Opp. 34-35 n.20. Neither argument has merit. This Court has already held in *Ryan* that when a witness is found in contempt for failing to comply with a subpoena, his interest is sufficient to permit an appeal of the contempt order notwithstanding its effect on the underlying litigation.¹ And allowing the petitioners' challenge would not open the floodgates to subpoena contests based upon the merits of the underlying action. The petitioners do not now challenge the merits of the complaint; they challenge the court's constitutional power to consider it. The courts *always* have an obligation to consider their power to act, *see, e.g., Bender v. Williamsport Area School District*, 106 S.Ct. 1326, 1331, 1334 (1986), and reaffirming that obligation at the subpoena and contempt stages poses no threat whatsoever to the orderly administration of justice. *Cf. In re Sequoia Auto Brokers, Ltd.*, 827 F.2d 1281

¹ Respondents necessarily concede that witnesses may appeal contempt citations based on a number of evidentiary privileges, the burdensomeness or overbreadth of a discovery request, or the harassing nature of the request. These issues may be far more time consuming and difficult to address than attacks on the court's power to issue and enforce process, because they are fact-specific as to each witness. Yet there is no suggestion that after *Ryan* federal courts have been unable to cope with the effect of contempt appeals on underlying litigation.

(9th Cir. 1987) (vacating contempt citation on the ground that bankruptcy court lacked jurisdiction to order civil contempt).

6. Respondents' arguments on the "merits" of the Article III standing issue merely highlight the importance of that issue. If respondents are permitted to maintain this suit, it would be the first case ever to grant standing to a plaintiff challenging the tax status of a third party. The decision would undermine this Court's decision in *Allen v. Wright*, 468 U.S. 737 (1984), and reopen the courthouse door to suits that "are rarely if ever appropriate for federal-court adjudication." *Id.* at 760. Religious organizations like the petitioners would find themselves subject to intrusive examination by their detractors. And the courts would find themselves in the business of second-guessing the IRS's judgments regarding what alleged violations of the Code to investigate and how to enforce the myriad restrictions imposed on exempt organizations. The question whether the respondents, whose tax status is not at issue, have the right to insist on such a judicial undertaking is worthy of this Court's attention.

7. The petitioners and the respondents appear to agree on one point—that the issues in this case are of fundamental importance. The reason is not, as the respondents contend, that the USCC/NCCB position would create a broad exception to the general rule against interlocutory appeals. It is rather that the position of the respondent and the court of appeals majority would create a broad exception to a more basic rule of federal Constitutional law—that the judicial power extends only to the resolution of cases and controversies.

CONCLUSION

For these reasons and the reasons stated in the Petition, the Petition for Writ of Certiorari should be granted.

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No. 83-416

In the
Supreme Court
of the United States

OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE and
NATIONAL CONFERENCE OF CATHOLIC BISHOPS,

Petitioners,

vs.

ABORTION RIGHTS MOBILIZATION, INC., and
JAMES A. BAKER, III,
SECRETARY OF THE TREASURY, and
LAWRENCE B. GILLS,
COMMISSIONER OF INTERNAL REVENUE,

Respondents.

MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE AND
BRIEF AMICUS CURIAE

OF THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN
THE U.S.A., THE BAPTIST JOINT COMMITTEE ON PUBLIC
AFFAIRS, THE CATHOLIC LEAGUE FOR RELIGIOUS AND
CIVIL RIGHTS, THE CHRISTIAN LEGAL SOCIETY, THE
CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE
LUTHERAN CHURCH-MISSOURI SYNOD, AND THE
NATIONAL ASSOCIATION OF EVANGELICALS, IN SUPPORT
OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Whether an order holding a major religious body in civil contempt and imposing substantial fines for refusal to comply with massive discovery requests for sensitive internal church records should be vacated for want of subject matter jurisdiction because the plaintiffs lack standing, either as voters or as members of the clergy, to challenge directly the tax-exempt status of the religious body because of its activity in furtherance of sincerely held religious convictions on a matter of public concern.

Whether a major religious body held in civil contempt may be denied standing as a witness to challenge the underlying jurisdiction of the federal court which entered the discovery order and found the church in civil contempt, on the view that "colorable" jurisdiction suffices to postpone consideration of the church's jurisdictional challenge until the requested discovery of the church's records is completed and the underlying action to revoke the tax-exempt status of the church is decided on the merits.

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**MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE AND
STATEMENT OF INTEREST OF AMICI CURIAE**

At first blush this case seems to be a straightforward matter of standing. Petitioners and federal respondents have suggested that this Court should grant the writ because the rulings of the district court and the court of appeals on standing represent significant departures from the binding precedents of this Court.

Amici curiae are major religious bodies in the United States, or membership organizations concerned with the preservation of religious freedom. Amici express concern that these standing errors have a First Amendment flavor because of their potentially severe impact on the ability of religious bodies to communicate their message freely on matters of public concern. The conferring of standing to challenge the exempt status of a religious body on private third parties who are hostile to the teachings of that religious body represents a serious inroad on the fragile freedoms of all bona fide religious bodies.¹ This negative impact on religious freedom is

¹ The remedy sought by the plaintiffs is court-ordered revocation of the tax-exempt status of the church. For the reasons argued in the attached brief, amici suggest that the use of the courts to obtain this relief undermines the necessary degree of flexibility required under *Walz v. Tax Commission*, 397 U.S. 664 (1970), where this Court taught that the central meaning of the Establishment Clause is that "no religion be sponsored or favored, none commanded, and none inhibited. . . . Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.*, at 669. It is difficult to conceive of greater authoritarian rigidity than to give to any opponent of the teachings of a religious body access to federal court to seek an injunction to compel the revocation of that church's exemption from the payment of federal income tax and a whole series of cascading events flowing from the loss of that status. With the loss of exempt status under I.R.C. § 501(c)(3), a religious body would not only have to pay taxes on all income, but all contributions to the

demonstrable irrespective of whether the focus of the controversy is, as here, the vexing issue of abortion or is some equally pressing social issue about which a religious body wishes to communicate with the public. It is likewise demonstrable irrespective of the substantive convictions of any religious body on a controversial matter of public concern.

Amici have sought the consent of the parties to participate in this matter by the filing of the attached brief. The petitioners and the federal respondents have granted their consent. The original and a copy of the consent letters of the counsel of record for the petitioners and of the Solicitor General have been submitted to the Clerk of this Court. This motion is required because the private respondents (Abortion Rights Mobilization, et al.) have refused to allow the leaders or representatives of major religious bodies who have signed the attached brief to be heard in this Court on this matter.

Amici are aware that motions for leave to file an amicus brief in advance of the grant of certiorari are disfavored under Rule 36.1 of this Court, but file this motion nonetheless because of the pressing national significance of this case and because of their unique ability to suggest to this Court the impact of this litigation on the autonomy and integrity of all religious bodies, irrespective of their convictions about the ethics of abortion.

As is evident from the statement of interests of the amici in this motion, some of the amici agree with the position of the petitioners on the abortion issue, and others do not.

church would no longer be deductible by the contributing taxpayer for purposes of federal income tax, I.R.C. § 170(c)(2)(D), federal estate tax, I.R.C. §§ 2055(a)(2) and 2106(a)(2)(A)(ii), and federal gift tax, I.R.C. § 2522(a)(2). In addition, most of the states have parallel provisions in their tax codes which incorporate I.R.C. § 501(c)(3) by reference, for purposes of determining the exemption of a religious body from payment of a wide variety of state and local taxes. Some states, moreover, predicate their regulatory authority over an entity seeking charitable contributions on the entity's federal tax-exempt status, conferring, for example, an exemption from annual reporting requirements to groups which are exempt under § 501(c)(3).

Nonetheless, all of the amici are of one mind that in our constitutional order a religious body must be free to address matters of public policy without being subjected on that account to harassing litigation by outsiders. Thus, a church which disagrees with the petitioners on the abortion issue should not be exposed to costly litigation by right to life advocates who might, under the theory advanced by the plaintiffs in the instant case, attack the exempt status of a "pro-choice" church for allegedly excessive involvement in the political order on the opposite side of the abortion issue.

In the view of the amici, this case involves four mistakes. The first two relate to the legal standing of the petitioners and the private respondents. The other two relate to the fragile civil liberty of religious freedom. None of these constitutional errors is "harmless." Each of them merits the attention of this Court. This conclusion is all the more necessary since the case is compounded by a juxtaposition of four serious constitutional errors.

The first standing mistake was the ruling of the district court that the private respondents (plaintiffs below) *have standing*, either as voters or as members of the clergy, to challenge the tax-exempt status of a major religious organization. This mistake enlarges the power of the judiciary and diminishes the role of the executive over the administration of federal tax policy in a manner directly contrary both to the requirements of the constitution and to the clear intent of Congress.

The second standing mistake was the ruling of the court of appeals that the petitioners *lack standing* as witnesses to challenge the subject matter jurisdiction of the federal court to enter a compulsory discovery order against a religious body, and to hold the church in civil contempt for its refusal to comply with the discovery order. This mistake bootstraps the governmental interest in efficient administration of criminal justice into an undifferentiated power over religious bodies in a civil suit, on a record where it is plain that the church had no legal mechanism available to it other than civil contempt in order to seek appellate review of the first standing mistake.

The first mistake relating to religious freedom was the ruling of the district court requiring the petitioners to hand over to the plaintiffs *massive amounts of sensitive internal church records*, including confidential tax returns which the private respondents may not obtain from the federal respondents because Congress has expressly prohibited the executive from disclosing such information to anyone, let alone to the political adversaries of a not-for-profit religious organization. The permissibility of this contempt citation under the facts in this case and under relevant free exercise standards is adequately preserved on this record, but this Court may avoid a decision on this issue by focusing, as the parties themselves apparently prefer to do, on the standing questions. In the event that this court elects this path, amici urge this Court to make plain that the question of intrusive civil discovery of the internal records of a religious body is reserved, and to refrain from dicta that would serve in any way to diminish the associational privacy of religious bodies by broadening access to their internal records by hostile outsiders.

The second mistake relating to religious freedom involves the raw judicial power of the district court in holding a major religious body in civil contempt and in imposing *fines in the amount of \$100,000 per day on the church petitioners* for each day in which they refuse to comply with the court's compulsory discovery order. The permissibility of this contempt citation under the facts in this case and under free exercise standards is adequately preserved on this record, but this Court may likewise avoid a decision on this issue by focusing on the standing questions. In the event that this Court elects this path, amici urge this Court to make plain that the imposition of coercive fines on the magnitude in this case is a reserved question, and to refrain from any dicta that would serve to diminish the legitimate autonomy of religious bodies by expanding judicial power over these bodies where less restrictive alternatives (e.g., certification of the ruling on the standing of the plaintiffs for an interlocutory appeal) would serve any interest which may be asserted on behalf of orderly administration of justice and would obviate inquiry into

whether the interest in behalf of the contempt order in this case was truly "compelling."

The statement of the interest of each amicus participating in this brief follows.

The National Council of Churches of Christ in the U.S.A. [NCC] is a community of thirty-one religious communions numbering over 40 million members. Some of these communions would agree with the views expressed by the petitioners concerning the morality of abortion; some of them would disagree. All of them have agreed, however — through their representatives on the Governing Board of the NCC — in support of religious bodies and all citizen groups to speak and to act on questions of public policy without suffering state-imposed penalties or disabilities. The Governing Board of the NCC has specifically recommended that its member communions not impair the relationships of confidence and trust within the religious community by disclosing to outsiders "the names of contributors, members, constituents . . . [or] personnel files, correspondence or other confidential and/or internal documents or information." The NCC joins this brief in support of the right of a religious body to be free of governmental constraint to disclose such information to hostile outsiders.

The Baptist Joint Committee on Public Affairs [BJCPA] consists of representatives elected by each of eight cooperating Baptist conventions in the United States: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These Baptist groups have nearly 30 million members and reflect the traditional Baptist concern for proper church-state relations. The BJCPA has as one of its mandates the obligation to respond "whenever Baptist principles are involved in, or are jeopardized through, governmental action." Among Baptists, the freedom of the church from entangling relationships with the government is a fundamental and sacred principle.

The Catholic League for Religious and Civil Rights [League] is a civil rights and anti-defamation organization, national in membership, dedicated to the defense of religious liberty and freedom of expression. Although the League does not purport to speak directly as the official voice of a religious body, this case raises substantial questions relating to central concerns of the League's members. When antagonists of a particular church invoke the power of the government to conduct far-reaching and intrusive examination of sensitive internal church documents, religious liberty suffers. When political opponents seek to penalize protected expressive activity crucial to effective church teaching on matters of public concern by maintaining costly and burdensome lawsuits, genuine freedom of expression is chilled and cannot flourish.

The Christian Legal Society [CLS] is a non-profit professional association of 3,500 Christian judges, attorneys, law professors and law students founded in 1961. The Center for Law & Religious Freedom is a division of the CLS founded in 1975 to protect the free exercise of religion, supporting the appropriate accommodation by the state of religious beliefs and practices and the respect for religious rights required by the First Amendment.

The Church of Jesus Christ of Latter-Day Saints [LDS Church] has an international membership in excess of 6 million members with general headquarters in Salt Lake City, Utah. There are in excess of 8,400 congregations in the United States. In the view of the hierarchical leadership of the LDS Church, viz., The First Presidency and The Quorum of the Twelve Apostles, the instant case raises serious questions as to whether faithful attention was paid to constitutional guarantees of religious freedom. The leadership of the LDS Church also expresses grave concerns as to the consequences of court-ordered opening of sensitive church records as was mandated by the lower court.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the eighth largest Protestant body in the United States. It has approximately sixty-two thousand member congregations

which, in turn, have approximately 2.6 million individual members.

The National Association of Evangelicals, located in Wheaton, Illinois, is a non-profit association of evangelical Christian organizations, including fifty thousand churches from seventy-eight denominations. It serves a constituency of 10 to 15 million people through its commissions and affiliates.

For the reasons stated in this Motion for Leave to File a Brief Amicus Curiae, amici respectfully urge this Court to grant their motion and to grant the petition for certiorari.

Respectfully submitted,

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ARGUMENT

I.

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE SENSITIVE TASK OF REVOCATION OF THE TAX-EXEMPT STATUS OF RELIGIOUS ORGANIZATIONS SHOULD NOT BE ENTRUSTED TO PRIVATE THIRD PARTIES MERELY BECAUSE THEY DO NOT AGREE WITH THE MESSAGE OF RELIGIOUS NOT-FOR-PROFIT ORGANIZATIONS ENGAGED IN PUBLIC STATEMENTS OF MORAL POSITIONS ON A VARIETY OF PUBLIC POLICY MATTERS.

At one level this case is truly one of first impression. For the first time since the founding of the republic a federal district court has found a major religious body, the Roman Catholic Church [church] comprising some 52 million Americans, represented according to their governing polity by the petitioners, in contempt of court. And the district court has imposed significant penalties, in the amount of \$100,000 a day for each day's refusal to comply with the discovery requests of the plaintiffs, *Abortion Rights Mobilization, Inc. v. Baker*, 110 F.R.D. 337 (S.D.N.Y. 1986). A. 441-51a.² Amici address the national significance of the sweeping discovery order and the contempt citation in Part II B of this brief, *infra*.

At another level this case is but a classic illustration of why there are rules on standing, and of the pernicious consequences of ignoring those rules. The underlying reason for this church's reluctant decision to allow itself to be held in contempt of court is its conviction, based on the advice of its legal counsel,

² In an unreported order on May 9, 1986 the district court stayed the fines imposed in his order of May 8. A. 52a. The court of appeals has also granted a stay during the pendency of the appeal to this Court. A. 105a, 108a.

that the district court lacks jurisdiction over the subject matter, and therefore is without power to enforce the subpoenas duces tecum of the plaintiffs, private third parties who attack the tax-exempt status of the church.

In the view of the amici this case involves two serious mistakes on standing. The first standing mistake was the ruling of the district court that the private respondents (plaintiffs below) *have standing*, either as voters³ or as members of the clergy,⁴ to challenge the tax-exempt status of a major religious organization. (See I A. & I B, *infra*). The second standing mistake was the ruling of the court of appeals that the petitioners *lack standing* as witnesses to challenge the subject matter jurisdiction of the federal court to enter a compulsory discovery order massive in scope against a religious body, and to hold the church in civil contempt for its refusal to comply with the discovery order. (See II A, *infra*).

³ In *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1981), [ARM I] the district court rejected the standing of the plaintiffs to litigate an alleged violation of equal protection on the ground that they could not identify any personal injury distinct from that of the public generally. *Id.*, 544 F. Supp. at 483. A. 75a-76a. Notwithstanding this finding, the district court ruled (1) that all the individual plaintiffs have standing as voters to litigate an alleged "distortion in the political process" arising from the implementation of federal tax law, and (2) that the plaintiff exempt organizations have standing to represent their members who are voters. *Id.* 544 F. Supp. at 480-482. A. 69a-74a.

⁴ The district court denied Establishment Clause standing to the individual plaintiffs and exempt organizations, *Abortion Rights Mobilization v. Regan*, 544 F. Supp. 471, 478 (S.D.N.Y. 1982) A. 62a-67a, but ruled that the clergy plaintiffs had standing under the Establishment Clause because they had articulated sufficient injury by virtue of the alleged "denigration" of their religious beliefs and "frustration" of these plaintiffs' ministries arising from the "tacit government endorsement of the Roman Catholic Church view of abortion," characterized as governmental "favoritism to a different theology." *Id.*, at 479. A. 67a-69a. Finding "colorable" jurisdiction predicated upon voter standing, the court of appeals declined to rule on the issue of clergy standing.

A. The District Court Erred in Conferring Standing on the Private Respondents (Plaintiffs below) to Challenge the Exempt Status of a Major Religious Organization on the Grounds that the Plaintiffs are Either Voters or Members of the Clergy.

Amici agree with the petitioners and the federal respondents that one reason for granting the writ is that the decisions of the district court and the court of appeals are flatly inconsistent with the binding precedents of this Court on standing.⁵ Amici do not address these concerns directly in this brief, but express concern that these standing errors have a First Amendment flavor because of their potentially severe impact on the ability of religious bodies to communicate their message freely on matters of public concern. The conferring of standing to challenge the exempt status of a religious body on private third parties who are hostile to the teachings of that religious body represents a serious inroad on the fragile freedoms of all bona fide religious bodies, irrespective of their convictions on the particular issue of abortion underlying this case.

Like the instant case, *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976) involved a challenge to the tax-exempt status of third party organizations. In *Simon* this Court refused to find a causal link between a revenue ruling under I.R.C. § 501(c)(3) and a reduction in services to indigents, and it ruled that "[i]t is purely speculative whether the denials of service specified in the complaint fairly could be traced to petitioners' encouragement or instead result from decisions made by the hospitals without regard to the tax implications." *Id.* at 42-43. The clear implications of *Simon* were ignored by

⁵ See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *United States v. Richardson*, 418 U.S. 166 (1972); and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S.A. 208 (1972).

the district court, which conferred standing on the private respondents (plaintiffs below) because of their status as voters or as members of the clergy.

(i) Voter standing

In both *Simon* and *Allen v. Wright*, 468 U.S. 737 (1984), this Court established that standing is deficient where a plaintiff challenging the tax status of a third party fails to focus on the conduct of the tax-exempt organization. *Simon*, 426 U.S. at 44-46; *Allen*, 468 U.S. at 757, n. 22. Despite the similarity between these precedents and the instant case, the district court conferred standing on the plaintiffs in their capacity as voters, on the view that they have somehow been disadvantaged by the federal respondents' alleged "preferential treatment" of the church. The fallacious premise for this view appears to be that taxed contributions translate into less voting power than non-taxed contributions. This analysis is flawed for two reasons. First, the plaintiffs have not experienced a cognizable injury in their capacity as voters that supports a grant of Article III standing in this capacity. The actual voting power of each individual plaintiff at the polling place is not in the least restricted by campaign activities whether conducted by taxed or tax-exempt organizations. The participation of the plaintiffs in political life is no less significant than that of other voters, *Baker v. Carr*, 369 U.S. 186, 208 (1962), and is not affected by the granting or revocation of exempt status to the petitioners.

Second, even if it were assumed that plaintiffs had suffered some palpable injury to their rights of franchise, the injury was not caused by the actions of the government, as it was in *Baker v. Carr*, *supra*, and it is not easily redressable by a court order revoking the tax-exempt status of the petitioners. As this Court held in *Allen*, even if a plaintiff has sustained an injury, standing is still deficient where "the injury alleged is not fairly traceable to the Government conduct . . . challenge[d] as unlawful." *Allen*, 468 U.S. at 757. The *Allen* Court reasoned that it was "entirely speculative whether withdrawal of the tax

exemption of racially discriminatory schools would have any impact on the ability of respondents' children to receive a desegregated education." *Id.* at 758. Similarly, the injury to the plaintiffs in the instant case is not traceable to government conduct, and altering that conduct will not redress the alleged injury. Plaintiffs' claimed injury is actually traceable not even to the petitioners, but to third party taxpayers who choose voluntarily to make charitable contributions to the petitioners. The injury claimed is the added influence that the Catholic church has because of the tax-free money that is available to spend on campaigns opposing abortion. It is, however, purely conjectural to believe that taxing these charitable gifts will in any significant way diminish the influence of that church on abortion policy in this country. The church's campaign against abortion is evidently grounded in sincerely held religious beliefs. For this reason it is highly doubtful that the church would decrease its efforts to communicate its teaching on abortion if the district court were to order the federal respondents to revoke the petitioners' tax-exempt status. In short, the claimed injury to voting rights is not cognizable injury which is traceable to governmental action or redressable by a court order.

(ii) Clergy standing

The district court likewise erred in conferring standing on the clergy plaintiffs on the view that the protected activity of the petitioners in exercising rights secured to them under the Free Exercise Clause and the Free Speech Clause (see Part II A or this brief, *infra*) violates the rights of these clergy plaintiffs secured under the Establishment Clause. This conclusion is erroneous for three reasons. First, there is "no principled basis on which to create a hierarchy of constitutional values. . . ." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 484 (1982). Furthermore, "[t]he proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those

provisions has no boundaries.” *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974).

Second, the plaintiff must show not mere psychological distress that one’s view of the constitutional order has been offended, but direct and palpable injury caused by the illegal conduct of the plaintiff. In *Valley Forge* the Court held that the plaintiffs lacked standing because they “fail[ed] to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees.” *Id.* at 485. Noting that the plaintiffs’ grievance was “not a direct dollars-and-cents injury but is a religious difference,” *id.* at 478, citing *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952), the Court concluded that the case and controversy requirement may not be dispensed with even “when the underlying merits concern the Establishment Clause.” *Id.* at 489. As Chief Justice Rehnquist wrote in *Valley Forge*: “The federal courts were simply not constituted as ombudsmen of the general welfare.” *Id.* at 487.

Further support for the proposition that psychological injury is not enough to sustain a finding of standing may be found in *Allen*, 468 U.S. 737 (1984). The Court in *Allen* denied standing to black parents who claimed that they suffered “stigmatic” injury because of the tax-exempt status of segregated private schools. The Court did not consider stigmatic injury of the sort complained of here to be personal injury that is traceable to governmental action or redressable by the court. *Id.* at 754-56.⁶

⁶ Although *Allen* seems plainly to require the result that the private respondents lack standing, the district court in *Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. 970 (S.D.N.Y. 1985), A. 93a-102a, expressly declined to modify its earlier ruling on voter and clergy member standing in the light of *Allen*, and even to certify the standing matter for purposes of an interlocutory appeal by the petitioners. The district court’s refusal to certify its rulings on this matter for interlocutory appeal triggered the contempt proceedings as the only legal mechanism available to the petitioners to challenge the

The claimed injury to the clergy in the instant case is indistinguishable from the “psychological” injury found insufficient to confer standing in *Valley Forge* and the “stigmatic” injury addressed in *Allen*. The extent of the “injury” to these members of the clergy is easy to assert, but impossible to measure or to trace. It is difficult to imagine how their ability to minister to their flocks could be affected by the outcome of this litigation. As the diversity among religious bodies included among the amici demonstrates, it is empirically obvious that the moral teaching of various religious bodies on abortion has not been contingent upon teaching of the Catholic church on this matter, let alone on the even more attenuated question of whether that church enjoys tax-exempt status. The implication to the contrary in the district court’s ruling in *ARM I* merely serves to reemphasize the need for rules of standing that prevent the use of federal courts for religion-bashing.

Third, the district court erred in assuming that the grant of tax-exempt status to a religious body constitutes “tacit government endorsement of the Roman Catholic Church view of abortion,” A. 67a, or “official approval of an orthodoxy,” A. 68a. See *Walz v. Tax Commission*, 397 U.S. 664 (1970).⁷ In discharging the task committed to them by Congress, the federal respondents have not “denigrated” the religious beliefs of the plaintiffs who are members of the clergy; nor has the government in any way “frustrated” the ministry of those plaintiffs. Although the plaintiffs who are clergy members may subjectively feel that their beliefs are “denigrated” by the tax-exempt status of the Catholic church, that is not enough to

jurisdiction of the court to order massive discovery of sensitive internal church records. See Part II B, *infra*.

⁷ Far from requiring that religious organizations would be muffled because of their exempt status, *Walz* assumes that they “frequently take strong positions on public issues.” *Id.* at 670. This is true both for petitioners and for the exempt organizations of which the private respondents are clergy members. “Pro-life” and “pro-choice” groups enjoy both exempt status and the right to announce their message to the public.

establish standing under this Court's teaching in either *Simon* or *Allen*. As was suggested above with respect to voter standing, moreover, it is entirely speculative to conclude, as the district court did, that the revocation of the tax-exempt status of a religious body necessarily marks its decline in influence; this belief ignores the myriad of factors that influence the moral livelihood of a religious community.

B. The Private Respondents Lack Statutory Standing because Congress has Entrusted the Sensitive Task of Granting and Revoking the Tax-Exempt Status of Charitable Organizations not to Private Parties, but to Federal Respondents.

The standing requirement limits the jurisdiction of federal courts "to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 97 (1968).⁸ The separation of powers concept imbedded in the standing doctrine, then, admits of a congressional role in expanding the role of the courts, within Article III limits, if it chooses to do so. Far from conferring statutory standing on the plaintiffs in this lawsuit, however, Congress has given several indications in the tax code that support the opposite conclusion.⁹ In short,

⁸ *Allen*, *supra* and *Simon*, *supra* may not adequately be distinguished on the basis of *Flast*, which makes better sense as a precedent for pure Establishment Clause issues (such as the permissibility of tax exemptions for religious bodies, *Walz*, *supra*) than as a hook for getting at the sensitive internal documents of a religious body by means of "enforcement" proceedings brought not by the government, but by hostile third parties.

⁹ In the Anti-Injunction Act, Congress prohibited suits to restrain assessment or collection of any tax, whether brought by a taxpayer or, as here, a third party. I.R.C. § 7421(a). Congress has delegated the administration and enforcement of the tax laws exclusively to the Secretary and the Commissioner. I.R.C. § 7801(a). In addition,

Congress plainly intended the administration of the code, including the granting and revocation of exempt status under § 501(c)(3), to be within the discretion of the federal respondents over whom Congress has a great deal of control through the oversight process, rather than within the boundless imagination of plaintiffs seeking to enforce their notions of tax equity in the federal courts. The consequences of the district court's view of standing, however, is that it undermines the express intent of Congress by allowing private parties and the federal courts to usurp the role of both the legislative and executive branches, contrary to this Court's teaching in *Valley Forge* that Article III power is "not an unconditioned authority to determine the constitutionality of legislative or executive acts." 454 U.S. at 471. It is likewise clear under *Valley Forge* that the plaintiffs do not have "license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." 454 U.S. at 487.

For this reason, even when suits to compel the executive branch to undertake enforcement committed to its discretion are "premised on allegations of several instances of violations of law, [they] are rarely if ever appropriate for federal-court adjudication" *Allen*, 468 U.S. at 759-760. Noting that an agency decision regarding enforcement proceedings "has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the

Congress gave to the federal respondents the power to "prescribe all needful rules and regulations for the enforcement of" those laws. I.R.C. § 7805(a). And Congress reserved for itself the task of overseeing the enforcement of the revenue laws by creating a Joint Committee on Taxation to investigate the administration, operation, and effects of the tax system. I.R.C. §§ 8001-8023. These provisions reflect congressional intent to operate the tax system within the legislative and executive branches. Congress, moreover, has expressly mandated that the IRS maintain the confidentiality of tax records, I.R.C. § 6103; and out of concern for the delicate character of religious freedom, Congress has expressly limited the power of the IRS to conduct audits of church bodies. I.R.C. § 7605(c).

Constitution to 'take Care that the Laws be faithfully executed.' U.S. Const., art. II, § 3," *Heckler v. Chaney*, 470 U.S. 821, 832 (1985), this Court has emphasized that executive agency decisions *not to enforce* are characteristically unsuitable for judicial resolution because this discretionary choice "often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Id.*, 470 U.S. at 831. In the instant case this principle demands reversal of the district court's ruling on standing which removes from the federal respondents delicate IRS decisions that must take into account the protections of the First Amendment and hands them over to litigants who have not shown "a direct dollars-and-cents injury, but [only] a religious difference," *Valley Forge*, 454 U.S. at 478. The likelihood that disgruntled third parties will be sensitive to the free speech and free exercise concerns of non-profit organizations they oppose is slim. The probability that religious organizations will become the target of third parties hostile to their religious perspective is high.¹⁰

¹⁰ The standing rule adopted by the district court would do little to safeguard the core meaning of the Establishment Clause, and could easily open up the floodgates to litigation against churches by those hostile to their mission or ideas. See, e.g., *Khalaf v. Regan*, 85-1 U.S. Tax Case 1 9269 (D.D.C. 1983) (dismissing on standing principles effort of anti-Zionist organization to revoke exempt status of Jewish charitable organizations because of their support of Israel); *American Society of Travel Agents, Inc. v. Blumenthal*, 566 F. 2d 145 (D.C. Cir. 1977), cert. denied, 435 U.S. 947 (1978) (dismissing on standing principles attack on exempt status of American Jewish Congress by business competitors). The potential for mischief of this sort, moreover, is not limited to religious not-for-profit organizations, but could readily affect exempt charitable organizations which are secular in character. For example, a member of the Ku Klux Klan who is a registered voter could hypothetically sue the Secretary of the Treasury to revoke the exempt status of the NAACP if the civil rights education fund were to participate in voter education deemed impermissible under the restrictive regulations in Rev. Rul. 78-248 (construing § 501(c)(3) to prohibit distribution of accurate information to voters if the voter guide focuses on a single issue such as land conservation). Similarly, opponents and proponents of gun

Even if such suits are eventually decided on the merits in favor of the religious body attacked by private parties in the court, significant harm to religious freedom may result, as this record illustrates, from subjecting the religious body to inquiries which violate the legitimate autonomy of the religious body. (See II B, *infra*) At the very least such intrusions cannot be justified on the basis of protecting litigants whose tax liability is not even affected. For these reasons, this Court should grant the writ in order to reverse the district court's erroneous ruling on standing.

II

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE DECISION OF THE COURT OF APPEALS UNDERMINED THE ABILITY OF A MAJOR RELIGIOUS ORGANIZATION TO CHALLENGE THE POWER OF A FEDERAL COURT TO IMPOSE SUBSTANTIAL FINES ON THE CHURCH FOR ITS REFUSAL TO HAND OVER EXTENSIVE INTERNAL DOCUMENTS RELATING TO PASTORAL PLANS TO ENGAGE IN CONSTITUTIONALLY PROTECTED ACTIVITY THROUGH MORAL ADVOCACY ON MATTERS OF PUBLIC CONCERN PRESENTED TO THE ELECTORATE FOR THEIR DELIBERATION AND DECISION.

control could use the courts rather than the halls of Congress and other legislative chambers to carry on their debates. Even if their suits were ultimately dismissed on the merits, they would have succeeded in obtaining valuable information about their opponents that would otherwise be unavailable to them.

- A. Where a Major Religious Body was Held in Civil Contempt as a Witness in Exemption-Revocation Proceedings Initiated by Outsiders Hostile to its Message on a Matter of Public Concern, the Court of Appeals Erred in Denying the Church Standing to Challenge the Underlying Jurisdiction of the District Court to Order Discovery of Sensitive Internal Documents, on the View that "Colorable" Jurisdiction Suffices to Postpone Consideration of the Church's Jurisdictional Challenge until the Requested Discovery of the Church's Records is Completed and the Underlying Action to Revoke the Tax-Exempt Status of the Church is Decided on the Merits.

The second standing mistake was the ruling of the court of appeals that the petitioners *lack standing* as witnesses to challenge the subject matter jurisdiction of the federal court to enter a compulsory discovery order against a religious body, and to hold the church in civil contempt for its refusal to comply with the discovery order. *In re United States Catholic Conference*, 824 F. 2d 156 (2d Cir. 1987). A 1a-43a.¹¹ In reaching this result, the court of appeals virtually ignored the recent teaching of this Court in *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 106 S.Ct. 1326 (1986), that "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review . . .'" 106 S.Ct. at 1331 (emphasis added). Thinking that this rule is inapplicable to interlocutory appeals, the court of appeals devised a new rule of standing, according to which the petitioners' challenge to the power of the district court to order massive discovery of the sensitive internal documents of a major religious body and

¹¹ On this record it is plain that subjecting itself to a civil contempt citation was the only available legal mechanism to seek appellate review of the first standing mistake "before undertaking any burden of compliance with the subpoena." *United States v. Ryan*, 402 U.S. 530, 533 (1971). See note 6 *supra*.

to hold it in contempt for failure to comply with this request must fail if the appellate tribunal finds a modicum of "colorable" jurisdiction in the lower court. The court of appeals justified this conclusion by extensive reliance on *Blair v. United States*, 250 U.S. 273 (1919), a case involving a challenge to the authority of the grand jury in a criminal investigation. Amici intimate no view as to whether the *Blair* rule is still required to serve the governmental interest in efficient administration of criminal justice. Amici urge, however, that it makes little sense to extend the rule into an undifferentiated power of private plaintiffs over religious bodies in a civil suit, especially where the government does not assert the interest at issue in *Blair*.¹²

Even if this case were a criminal prosecution of a bogus "church," the normal rule for the judiciary would be to defer to the discretion of the executive in conducting the prosecution. See, e.g., *United States v. Cox*, 342 F. 2d 167 (5th Cir. (1965) (en banc), cert. denied, 381 U.S. 935 (1965)). But this is not a case in which the government is aligned against a religious body because of an alleged violation of the tax code. See, e.g., *Bob Jones University v. United States*, 461 U.S. 574 (1983). It is a case in which private parties seek to use the federal courts to inflict a penalty on a major religious body for the evident reason that they disagree with the moral teaching of that church on a controversial matter of public concern. Under these circumstances and in the light of *Heckler v. Chaney*, *supra*, this case is hardly an apt vehicle for extending the reach of the *Blair* rule to religious bodies which choose to speak out on matters of conscience which are controversial in nature.

¹² In this case the federal respondents agree with the petitioners that the district court lacks subject matter jurisdiction. Indeed, the government has sought review of this very issue in the court of appeals and this Court on repeated occasions. See, e.g., Briefs of the United States in Nos. 86-157 and 86-162.

B. The Ability of a Religious Organization to Engage in Protected Activity is Severely Chilled when Federal Courts Impose Substantial Penalties on the Church for Failure to Comply with unduly Burdensome and Overbroad Subpoenas Seeking Extensive Discovery of Internal Records of the Pastoral Plans of the Church

- (i) Communicating sincerely held religious convictions on matters of public concern is protected activity.

Amici do not claim that when religious organizations choose to "enter a public forum and spread their view," *Heffron v. ISKCON*, 452 U.S. 640, 653 (1981), they are always entitled to protection greater than that enjoyed by non-religious social or political organizations. By the same token, however, religious bodies are surely entitled at the very least to no lesser degree of protection than that enjoyed by their secular counterparts. See, e.g., *McDaniel v. Paty*, 435 U.S. 618, 640 (1978) (Brennan, J., concurring). It is likewise clear that special concerns of religious autonomy and integrity arise when the government seeks to regulate a religious body which are not present when it seeks to regulate a secular organization. See, e.g., *Corp. of Presiding Bishop v. Amos*, 480 U.S. —, 107 S.Ct. 2862, 2871 (1987) (Brennan, J. concurring); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). And see Laycock, "Towards a General Theory of the Religion Clauses," 81 *Colum. L. Rev.* 1373 (1981).

Amici are of the view that restrictions on the political speech of religious organizations in § 501(c)(3) are deficient because they are by no means the alternative least restrictive of their rights secured under the Religion Clause and the Free Speech Clause. Indeed, it is difficult to imagine a restriction more total than the "absolute prohibition" on any participation by a 501(c)(3) organization in a political campaign whether on behalf of or in opposition to a candidate for public office. See, e.g., IRS Exempt Organizations Handbook (IRM 7751) § 3(10)1; and see Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii). It is

likewise hard to imagine that IRS rulings virtually prohibiting voter education efforts by exempt organizations on topics of concern to the organization, see, e.g., Rev. Rul. 78-160, 1978-1 C.B. 153, revised by Rev. Rul. 78-248, 1978-1 C.B. 1545, and Rev. Rul. 80-282, 1980-2 C.B. 178, would pass muster in judicial review that took seriously the mandate of *New York Times v. Sullivan*, 376 U.S. 254 (1964), that debate on issues of public concern must be "uninhibited, robust, and wide-open." *Id.* at 270. See generally, Caron and Dessinque, "I.R.C. § 501(c)(3): Practical and Constitutional Implications of 'Political' Activity Restrictions," 2 *J. of L. and Politics* 169 (1985) and literature cited *id.* at 180, n. 40, at 181, n. 41, and at 183 n. 54.

In another case before this Court during this Term amici have expressed their views that the Religion and Free Speech Clauses afford substantial protection against extensive governmental regulation of a religious body which chooses to announce sincerely held religious beliefs that relate directly to matters of public concern. See Amicus Brief of Baptist Joint Committee on Public Affairs in *Bemis Pentecostal Church v. State*, app. pending, No. 87-317. Without repeating those arguments here, amici note that public communication of sincerely held religious convictions on matters of public concern is protected activity.¹³ For example, amici and the representatives of a host of other denominations and religious bodies are called upon regularly to express the views of religious groups on a wide variety of social and political issues with pressing ethical components. In testimony before the House Ways and Means Committee in 1972, Dr. J. Elliott Corbett of the United Methodist Church entered into the record of these hearings a policy declaration of his church

¹³ Since this is true for religious groups on both sides of the abortion issue, it was error to confer standing on clergy members on the view that the exempt status of the petitioners somehow "frustrated" their ministry.

which bespeaks the impossibility of any total severance of religion and politics in our society:

"We believe that churches have the right and the duty to speak and act corporately on those matters of public policy which involve basic moral or ethical issues and questions. Any concept of church-government relations which denies churches this role in the body politic strikes at the very core of the religious liberty. The attempt to influence the formation and execution of effective means available to churches to keep before modern man the ideal of a society in which power [is] made to serve the ends of justice and freedom for all people." *Legislative Activity By Certain Types of Exempt Organizations*, Hearings Before the House Ways and Means Committee, 92d Cong., 2d Sess. at 303, 305 (1972). See also, *Influencing Legislation by Public Charities*, Hearing Before the House Ways and Means Committee 94th Cong., 2d Sess. (1976).

(ii) The scope of requested discovery is overbroad.

The means selected by the plaintiffs to achieve their goal in the instant litigation includes sweeping discovery requests that threaten the impairment of the integrity and autonomy of religious bodies. The standing issue is intimately connected with the threat to religious autonomy posed by the discovery requests, for a court without jurisdiction over the subject matter clearly lacks authority to enforce subpoenas for production of documents, whether the subpoenas are narrow or broad. Amici are particularly troubled that this case might turn into an inadvertent precedent damaging the autonomy of religious bodies. Hence amici urge this Court to focus particular attention on the intrusive character of the excessively broad discovery requests in the instant case and the potential chilling effect that granting such requests entails for similarly situated religious bodies.

Even if the district court had jurisdiction over the subject matter, the district court nonetheless erred in ordering massive compulsory production of internal church documents to a private third party and extensive depositions of church officials and employees.¹⁴

In the view of amici, the plaintiffs' discovery requests are seriously intrusive upon the autonomy and integrity of religious bodies. In the process of attempting to prove their case on the merits, attorneys for the plaintiffs have proceeded against the petitioners with discovery requests that seek to examine in depth and in great detail virtually all significant relationships between Roman Catholic institutions at all levels and the entire political process. The subpoenas duces tecum addressed to the petitioners demand production of voluminous material including internal church discussions regarding the formulation and implementation of the Catholic Bishops' position on one of the vexing and fundamental religious and political issues of our time, abortion.

If this Court sustains these subpoenas, the impact of this decision on the amici and similarly situated religious bodies could be staggering, for there would be no principled way to differentiate between the plaintiffs in the instant case and opponents suing the government to secure a judicial order revoking the tax-exempt status of another religious body because of that body's political involvement on any number of the other issues designated by the Catholic Bishops as "pro-life" matters (e.g., nuclear war, capital punishment, adequate health care, foreign policy and immigration policies relating to Latin America or South Africa). Once such a plaintiff hostile to a church's moral teaching on any one of these themes had commenced an action like the instant case, the door would be wide open to dissipate the resources of a not-for-profit

¹⁴ For a description of the subpoenas, see Petition for Certiorari, at 6-7. A more extensive and detailed description of the subpoenas, with references to the pages in the Appendix below, is found in the Appellants' Brief before the court of appeals, pp. 9-12.

corporation dedicated exclusively to religious purposes. Whatever may be said of the permissibility of the restraints on political speech contained in I.R.C. § 501(c)(3), Congress surely never contemplated nor intended the result of costly litigation against religious bodies initiated by private third parties.

This Court, however, need not support the district court's order for such broad discovery against a non-party, for the plaintiffs' discovery rights are predicated upon the ground that its claims are not without merit. See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). Federal courts have denied discovery altogether where no proof of facts in support of a claim would entitle the party seeking discovery to relief. See, e.g., *Westminster Investing Corp. v. G.C. Murphy Co.*, 434 F.2d 521 (D.C. Cir. 1970). Plaintiffs ground their cause of action: (a) on the view that as members of the clergy their religious convictions have been "denigrated" by an official policy of preferential treatment of the petitioners over other religious bodies who disagree with the petitioners on the issue of abortion, and (b) on the view that as registered voters they have suffered a diminution of the strength of their franchise because of alleged governmental "subsidy" of the petitioners. As was argued above, neither of these claimed bases for standing is significantly different from the bases asserted by the plaintiffs in *Allen v. Wright*, 468 U.S. 737 (1984). Furthermore, the interest of the plaintiffs in securing access to documents which could lead to discovery of relevant evidence must be shown to be greater than the legitimate First Amendment interests of the non-parties against whom discovery is sought. See, e.g., *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) (discovery of confidential news sources favored where a journalist is a party and is disfavored where he is not a party). Obviously greater protection should be afforded to a non-party, where the discovery excessively burdens delicate First Amendment rights that need "breathing space." *NAACP v. Button*, 371 U.S. 415 (1963). For these reasons, the legal predicate underlying the plaintiffs' discovery requests is seriously flawed, and their subpoenas should not be enforced.

- (iii) The penalties imposed on the petitioners are excessive because certification is an equally effective alternative less restrictive of religious autonomy.

It is well settled that religious bodies are afforded additional constitutional protection precisely because of their religious character. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The freedom of religious bodies to address many vexing social problems from a religious perspective should not be conditioned upon their compliance with overbroad and intrusive discovery orders. Nor should religious bodies be subjected to excessive sanctions for seeking appellate review of the underlying power of the court to issue such orders, unless the government can demonstrate that it has utilized the least restrictive means of achieving a truly compelling governmental interest. *Hobbie v. Unemployment Appeals Commission*, 480 U.S. —, 107 S.Ct. 1046, 1094 (1987); *Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

In the instant case, the district court plainly had such an alternative readily available. All of the painful confrontation between the judiciary and a major religious body over the past year and a half could have been avoided by certifying the ruling on standing for purposes of interlocutory appeal under 28 U.S.C. § 1292(b). Where the delicate issue of religious freedom hangs in the balance, the refusal of the district court to certify this standing ruling, even after the plain teaching of this court in *Allen*, constitutes an abuse of discretion so significant that this Court should grant the writ in order to reverse the district court on this matter.

The permissibility of the contempt citation imposed upon the petitioners under the facts in this case and under free exercise standards is adequately preserved on this record, but this Court may likewise avoid a decision on this issue by focusing on the standing questions. In the event that this court elects this path, amici urge this Court to make plain that the imposition of coercive fines of the magnitude in this case is a

reserved question, and to refrain from any dicta that would serve to diminish the legitimate autonomy of religious bodies by expanding judicial power over these bodies where less restrictive alternatives (e.g., certification of the ruling on the standing of the plaintiffs for an interlocutory appeal) would serve any interest which may be asserted on behalf of orderly administration of justice and would obviate inquiry into whether the interest protected by the contempt order in this case was truly "compelling."

CONCLUSION

For the reasons set forth in this brief, amici urge this court to grant the writ of certiorari sought by the petitioners and the federal respondents and to reverse the judgment of the court of appeals denying standing to the church witness to challenge the jurisdiction of the federal courts to entertain lawsuits by private parties opposed to the social message of the petitioners. Amici likewise urge this court to correct the error of the district court in *ARM I* that any of the plaintiffs have standing.

In the view of the amici the burden of compliance with the district court's order of massive discovery of sensitive internal church records likewise constitutes a grave threat to the legitimate autonomy of religious bodies in our constitutional order. In the event that this court decides to limit the grant of the writ exclusively to the standing issues, amici urge this Court to make plain that it has reserved the issues of the permissible scope of compulsory civil discovery of the internal records of a religious body, and of the imposition of substantial penalties on a religious body where a less restrictive alternative is available.

Respectfully submitted,

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Los Angeles, California 90025; that on October 22, 1987, I served the within *Motion For Leave To File Brief Amicus Curiae and Brief Amicus Curiae* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

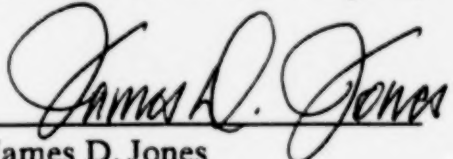
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James D. Jones
(Original signed)

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE
and
NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
v. *Petitioners,*
ABORTION RIGHTS MOBILIZATION, INC., *et al.,*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

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NOTICE

The following opinions and orders have been omitted in printing this Appendix because they appear on the following pages in the printed Appendix to the petition for a writ of certiorari, which is incorporated herein by reference.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 80 Civ. 5590

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Plaintiffs,

v.

DONALD T. REGAN,
Secretary of the Treasury, *et al.*,
Defendants.

DOCKET ENTRIES

Date	Nr.	Proceedings
10-02-80	1.	Filed Compl't. & iss. summs & notice purs. to rule 636(c)
01-30-81	5.	Filed pl'tffs amended compl't.
7-19-82	23	Filed Opinion #53431 . . . the motion to dismiss is granted in part and denied in part. CARTER, J. m/n
7-30-82	25	Filed Final Judgment as to USCC and NCCB Ordered that the motion of USCC and NCCB to dismiss all claims against them set forth in the amended complaint is granted; that all claims set forth in the amended complaint against USCC and NCCB are dismissed without prejudice in favor of defts USCC and NCCB and against pl'tffs . . . CARTER, J. Judgment entered 7-30-82 CLERK m/n
9-8-82	30	Filed defts Regan and Egger's ANSWER to the amended complaint. USA

Date	Nr.	Proceedings
2-3-82	35	Filed Opinion #53983 . . . The motion for § 1292(b) certification is denied. In light of the above disposition, there is no basis for a stay of discovery. The parties should proceed promptly to complete all the trial preparation as expeditiously as possible. CARTER, J. m/n esc
2-28-83	39	Filed plttfs' notice of deposition of US Catholic Conference, on 3-21-83.
2-28-83	40	Filed plttfs' notice of deposition of National Conference of Catholic Bishops, on 3-21-83.
4-15-83	42	Filed notice of motion of US Catholic Conference and National Conference of Catholic Bishops for an order quashing the subpoenas duces tecum served by plttfs and defts, purs. to Rule 45. ret: 5-9-83
4-4-84	57	Filed endorsement order . . . the motion to quash the plttfs' subpoenas is summarily denied . . . CARTER, J.
8-10-84	59	Filed defts' notice of motion for an order dismissing the complaint for lack of subject matter jurisdiction, purs. to Rule 12(b) (6). ret: 9-24-84
8-23-84	61	Filed memorandum of United States Catholic Conference and National Conference of Catholic Bishops as <i>amici curiae</i> in support of the Government's renewed motion to dismiss.
3-1-85	66	Filed Opinion #57313 . . . defts' renewed motion to dismiss the amended complaint for lack of subject matter jurisdiction is denied. CARTER, J. (copies mailed to counsel)

Date	Nr.	Proceedings
6-20-85	71	Filed plttf's affdvt of Marshall Beil & Notice of motion for an order holding the U.S. Catholic Conference and the National Conference of Catholic Bishops in contempt for failure to comply with the deposition subpoenas duces tecum served upon them on 4-3-84. ret: 7-5-85
6-26-85	73	Filed notice of motion for a protective order, purs. to Rule 26(c) of United States Catholic Conference and National Conference of Catholic Bishops. ret: 7-5-85
7-15-85	77	Filed Opinion. #57929. For these reasons the motion for certification of an interlocutory appeal from the court's previous order is denied. SO ORDERED. CARTER, J.
9-5-85	79	Fld. Memo-Endorsed Order that USCC & NCCB are ordered to comply with the subpoena forthwith, etc . . . CARTER, J.
10-11-85	82	Filed plttfs affdvt & Notice of Motion for an order holding US Catholic & National Conf. in civil contempt for failure to comply with deposition subpoenas duces tecum RET: 10-25-85
11-20-85	84	Filed Order that plttfs renewed motion for contempt is denied, without prejudice, etc. . . as indicated . . So ordered . . Carter, J. cmc
1-17-86	85	Filed true copy of Mandate Order from the USCA 2nd cir . . Ordered that the petition is denied . . . Clerk, USCA
7-4-86	88	Filed Protective Order the words "party or parties" include the plttfs & defts the term NCCB/USCC refers to NCCB, USCC and any other persons or entities affiliated with the Roman Cath. Church that become sub-

Date	Nr.	Proceedings
		ject to disc. and agree to be bound by the terms of this order . . . etc . . as indicated . . So Ordered . . Carter, J.
2-26-86	92	Filed Endorsement . . unless the court of appeals grants the petition for rehearing in the interim, the USCC/NCCB are ordered by 3-7-86 to produce the material requested by plttfs . . failure or refusal of the USCC/NCCB to produce material requested will constitute grounds for renewal plttfs motion . . So Ordered. Carter, J.
3-11-86	93	Filed true copy of mandate order & Statement of Costs from the USCA 2nd cir . . Ordered that petition for rehearing is denied . . Clerk, USCA 2nd cir.
3-19-86	84	Filed plttfs affdvt & Notice & plttfs renewed motion for contempt. RET: 3-31-86
3-20-86	86	Filed Stip & Order that the amended complt is further amended to delete the three plttfs Bostrom, Vuitch, & Delgado . . So Ordered . . Ward, J.
5-8-86	91	Filed opinion #59284 . . . motions are denied . . . etc . . as indicated. . So Ordered . . . Carter, J.
5-9-86	93	Filed Order that courts opinion is amended to add that it is the judgt on this Court that plttfs are entitled to attys fees for the time spent in disc. conf. & negotiations with USCC/NCCB after conf. concerning subpoenas . . . etc . . Carter, J.
5-12-86	94	Filed defts USCC & NCCB Notice of Appeal to the USCA 2nd cir from the order of 5-9-86.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ 5590 (RLC)

ABORTION RIGHTS MOBILIZATION, INC.; LAWRENCE LADER; HAROLD W. BOSTROM; MARGARET O. STRAHL, M.D.; HELEN W. EDEY, M.D.; RUTH P. SMITH; NATIONAL WOMEN'S HEALTH NETWORK, INC.; LONG ISLAND NATIONAL ORGANIZATION FOR WOMEN—NASSAU, INC.; RABBI ISRAEL MARGOLIES; REVEREND BEA BLAIR; RABBI BALFOUR BRICKNER; REVEREND ROBERT HARE; REVEREND MARVIN G. LUTZ; LAUREL CLINIC, INC.; MILAN M. VUITCH, M.D.; WOMEN'S CENTER FOR REPRODUCTIVE HEALTH; THE FEDERATION OF FEMINIST WOMEN'S HEALTH CENTERS, INC.; HARRISBURG REPRODUCTIVE HEALTH SERVICES, INC.; HAGERSTOWN REPRODUCTIVE HEALTH SERVICES, INC.; WOMEN'S HEALTH SERVICES, INC.; JANE C. DELGADO; JENNIE ROSE LIFRIERI; EILEEN WALSH; PATRICIA SULLIVAN LUCIANO; MARCELLA MICHALSKI; CHRIS NIEBRZYDOWSKI; JUDITH A. SEIBEL; KAREN DECROW; and SUSAN SHERER,

-against- *Plaintiffs,*

DONALD T. REGAN, Secretary of the Treasury; ROSCOE L. EGGER, JR., Commissioner of Internal Revenue; UNITED STATES CATHOLIC CONFERENCE, INCORPORATED; and NATIONAL CONFERENCE OF CATHOLIC BISHOPS,

Defendants.

AMENDED COMPLAINT

Plaintiffs, by their attorneys, for their amended complaint allege:

1. This is an action for declaratory and injunctive relief to enforce the doctrine of the separation of church and state as required by the First Amendment to the Con-

stitution of the United States and by § 501(c) (3) of the Internal Revenue Code, 26 U.S.C. § 501(c) (3).

Jurisdiction

2. This action arises under the First and Fifth Amendments to the Constitution; Article VI, Clause 3 of the Constitution; Sections 170 and 501 of the Internal Revenue Code (hereinafter "the Code"), 26 U.S.C. §§ 170 and 501; and 28 U.S.C. §§ 2201-02. Jurisdiction is founded on 28 U.S.C. § 1331, 1340, and 1361. The amount in controversy, exclusive of interest and costs, exceeds \$10,000.

The Parties

3. Plaintiff ABORTION RIGHTS MOBILIZATION, INC. ("ARM"), located in the City, County and State of New York, is a national, contributor-supported organization dedicated to the guarantee and implementation of the constitutional right of women to choose to have abortions. ARM is a nonprofit corporation exempt from taxes under § 501(c) (3) of the Code.

4. Plaintiff Lawrence Lader, a United States citizen residing in New York, New York, is the President of ARM. The following plaintiffs are each United States citizens and contributors to ARM:

- a) HAROLD W. BOSTROM, of Oconomowoc, Wisconsin;
 - b) MARGARET O. STRAHL, M.D., of Pelham, New York;
 - c) HELEN W. EDEY, M.D., of New York, New York; and
 - d) RUTH P. SMITH, of New York, New York.
- Each of these plaintiffs supports the goals for which ARM was formed and to which it devotes its activities.

5. Plaintiff NATIONAL WOMEN'S HEALTH NETWORK, INC. ("NWHN"), located in Washington, D.C., is a nationwide membership organization of individuals and organizations who, individually and jointly, seek to secure and implement, through research, publications, education and grants, women's rights to safe and legal abortions. NWHN is a non-profit corporation, exempt from taxes under § 501 (c) (3) of the Code.

6. Plaintiff LONG ISLAND NATIONAL ORGANIZATION FOR WOMEN—NASSAU, INC. ("Nassau-NOW") is a membership organization whose members, individually and jointly, are dedicated to the promotion of women's rights including the right to have an abortion. Nassau-NOW is a non-profit corporation exempt from taxes under § 501(c) (4) of the Code.

7. The following plaintiffs are clergymembers whose religious tenets, beliefs and teachings do not prohibit abortions but rather hold it permissible for women to choose to have abortions if they so desire:

- a) RABBI ISRAEL MARGOLIES who is Rabbi of Beth Am, the People's Temple of New York, New York;
- b) REVEREND BEA BLAIR who is Associate Pastor of the Church of the Heavenly Rest, an Episcopal Church in New York, New York;
- c) RABBI BALFOUR BRICKNER who is Rabbi of the Stephen Wise Free Synagogue of New York, New York;
- d) REVEREND ROBERT HARE who is Pastor of the Scarborough Presbyterian Church, New York, N.Y.;
- e) REVEREND MARVIN G. LUTZ, a Presbyterian minister with the Jacksonville (Florida) Clergy Consultation Service, Inc.

8. The following plaintiffs are doctors and medical clinics which perform abortions:

- a) LAUREL CLINIC, INC., Washington, D.C.;
- b) MILAN M. VUITCH, M.D., President of the Laurel Clinic, Inc.;
- c) WOMEN'S CENTER FOR REPRODUCTIVE HEALTH, Jacksonville, Florida;
- d) THE FEDERATION OF FEMINIST WOMEN'S HEALTH CENTERS, INC., Chico, California;
- e) HARRISBURGH REPRODUCTIVE HEALTH SERVICES, INC., Harrisburg, Pennsylvania;
- f) HAGERSTOWN REPRODUCTIVE HEALTH SERVICES, INC., Hagerstown, Maryland;
- g) WOMEN'S HEALTH SERVICES, INC., Pittsburgh, Pennsylvania.

9. The following plaintiffs are Roman Catholics who, in keeping with their religious beliefs and teachings, contribute to the Roman Catholic Church, but are opposed to the Church's position on abortion:

- a) JANE C. DELGADO, New York, New York;
- b) JENNIE ROSE LIFRIERI, Hastings-on-Hudson, New York;
- c) EILEEN WALSH, Seaford, New York;
- d) PATRICIA SULLIVAN LUCIANO, Seaford, New York;
- e) MARCELLA MICHALSKI, Pittsburgh, Pennsylvania;
- f) CHRIS NIEBRZYDOWSKI, Pittsburgh, Pennsylvania;
- g) JUDITH A. SEIBEL, Pittsburgh, Pennsylvania.

10. Plaintiffs KAREN DECROW, who resides in Syracuse, New York, and is a former president of the National Organization for Women, and SUSAN SHERER who resides in Plainview, New York, are taxpayers and registered voters. Plaintiffs Lader, Bostrom, Strahl, Edey, Smith, Margolies, Blair, Brickner, Hare, Lutz, Vuitch, Delgado, Lifrieri, Walsh, Luciano, Michalski, Niebrzydowski and Seibel are also taxpayers and registered voters.

11. Defendant DONALD T. REGAN is the Secretary of the Treasury of the United States ("Secretary"). Defendant ROSCOE L. EGGER, JR., is the Commissioner of Internal Revenue of the United States Internal Revenue Service (hereinafter respectively "Commissioner" and "IRS"). The Secretary and the Commissioner are the principal officials of the federal government responsible for the administration and enforcement of the Internal Revenue Code. 26 U.S.C. §§ 7801(a), 7802(a).

12. Defendants UNITED STATES CATHOLIC CONFERENCE INCORPORATED ("USCC") and the NATIONAL CONFERENCE OF CATHOLIC BISHOPS ("NCCB") (together collectively referred to as the "Roman Catholic Church" or "the Church"), are the two principal national organizations of the Roman Catholic Church in the United States. Upon information and belief: The USCC is a non-profit corporation which has been granted a tax exemption under § 501(c)(3) of the code on behalf of the entire Roman Catholic Church in the United States. The NCCB is an unincorporated association of the approximately 350 Catholic bishops in the United States. The governing bodies and principal staff of the USCC and the NCCB are the same.

General Allegations

13. In Section 501(c)(3) of the Internal Revenue Code, Congress exempted from income taxation any organization which is "organized and operated exclusively for", among others, "religious, charitable . . . or educational purposes."

14. Contributions by individual or corporate taxpayers to such organizations are made deductible for income tax purposes by § 170(a) of the Code.

15. The exemption is not without limitation. Section 501(c)(3) of the Code flatly prohibits a tax exempt organization from

“participat[ing] in, or interven[ing] in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.”

16. With regard to religious organizations, the prohibition of political activity for or against candidates for public office is a statutory recognition of the fundamental principle of the separation of church and state.

17. Such a prohibition is required by the First Amendment to the Constitution of the United States which prohibits the establishment of religion by the federal government.

18. Section 501(c)(3) also represents a sound policy judgment by the Congress that tax-exempt, deductible dollars should not be used by tax-exempt organizations to influence political campaigns.

19. The Roman Catholic Church has repeatedly and consistently breached this constitutional and statutory prohibition. The Church has repeatedly and consistently intervened in political campaigns to further its religious belief that no one should be able to obtain an abortion in the United States.

20. The Secretary and the Commissioner, however, have just as consistently overlooked these violations and failed and refused to perform their statutory duty to enforce the Code and the Constitution.

21. The blueprint for the Church's illegal activities is the pastoral plan entitled “A Pastoral Plan for Pro-Life

Activities” (hereinafter “the Pastoral Plan”) adopted by the USCC and the NCCB at a joint meeting in November 1975.

22. The Pastoral Plan calls upon “all church-sponsored or identifiably Catholic national, regional, diocesan and parochial organizations and agencies” (including the “NCCB/USCC . . . and priests, religious and lay persons”) “to activate the pastoral resources of the church” in a “major” three-fold educational, pastoral and political effort to outlaw abortions in the United States.

23. As part of its political effort, the Pastoral Plan pledges the “systematic organization and allocation of the Church's resources of people, institutions and finances,” both nationally and locally, to obtain the passage of a constitutional amendment prohibiting abortions and of other anti-abortion legislation.

24. One method described by the Pastoral Plan to achieve this goal is the creation of “congressional district pro-life action group[s]” whose objectives are, *inter alia*:

“(8) To elect members of their own group of active sympathizers to specific posts in all local party organizations.

“ . . .

“(10) To maintain an informational file on the pro-life position of every elected official and potential candidate.

“(11) To work for qualified candidates who will vote for a constitutional amendment, and other pro-life issues. . . .”

25. Upon information and belief: Pursuant to Church policy, Roman Catholic priests and other Church officials have actively and systematically participated in political campaigns in all parts of the country, supporting “pro-life” and opposing “pro-choice” candidates for public office. Some of these recent activities include:

- a) During the 1978 and 1980 political campaigns, church newspapers and bulletins in many parts of the country, including Minnesota, Michigan, Pennsylvania and Texas, published articles attacking by name pro-abortion candidates.
- b) One such journal, the official publication of the San Antonio, Texas archdiocese, published in May 1970 an editorial supporting Ronald Reagan, attacking John Anderson and commenting on specific congressional candidates. The article was entitled "To the IRS—'NUTS!!!"
- c) In October 1978 agencies and officials of the Pittsburgh, Pennsylvania diocese published bulletins and letters criticizing Congressman William Moorhead by name and urging Catholics to vote for his named opponent.
- d) In September 1980, Humberto Cardinal Medeiros, Roman Catholic Archbishop of Boston, attacked two candidates for Congress in a letter sent to 410 parishes a few days before the primary election. The letter was read from many pulpits and published in the official archdiocese newspaper. A few days earlier Monsignor Battista of the Catholic diocese of Worcester, Mass., distributed widely a letter also attacking one of the candidates by name for his stand on abortion.
- e) In April, 1980, a South Dakota priest publically attacked by name Senator George McGovern because of his abortion rights stand, supported his opponent by name and called upon his "brother priests" for their "moral and active support in promoting Larry's candidacy in your community."

26. Upon information and belief: Many Catholic priests and other Church officials in all parts of the country, including New York, have, from their pulpits, regularly

and repeatedly urged their congregants to donate to "right-to-life" committees and political parties, to obtain (often in the church parking lot following the service) "right-to-life" campaign literature, to sign the nominating petitions of "right-to-life" candidates. At least one church has distributed "right-to-life" leaflets with the church bulletin.

27. In addition, upon information and belief: many of the dioceses and archdioceses of the Roman Catholic Church in the United States have contributed substantial sums of money to "right-to-life" and other political groups which have, directly or indirectly, supported the political candidacies for public office of persons favoring anti-abortion legislation.

28. In 1976, for example, upon information and belief, the Church in New York donated substantial sums to the New York State Right to Life Committee which was then actively promoting the senatorial candidacy of James Buckley.

29. These and other activities of the Roman Catholic Church violate the clear language and intent of § 501(c) (3) prohibiting the use of tax-exempt funds in political campaigns for public office.

30. Upon information and belief: The IRS, the Secretary and the Commissioner have had knowledge of these illegal activities. The adoption of the Pastoral Plan and many of the illegal activities described above, as well as others, have been well publicized in the general secular press, the Catholic press and other media.

31. Upon information and belief, the IRS has been specifically informed of the Church's illegal activities by other citizens and taxpayers who have requested enforcement action. No such action has been taken.

32. Although they are under a ministerial duty to do so, the Secretary and the Commissioner have done nothing

ing to enforce the law. They have not revoked the tax-exempt status of the USCC or any other Roman Catholic Church agency or organization. Nor have they taken any appropriate preventive or enforcement measures against the Church for these violations of § 501(c) (3).

33. Upon information and belief, the IRS has revoked or threatened to revoke the tax-exempt status of others, including other religious and secular organizations, who have violated or have been charged with violating § 501(c) (3). The Secretary and the Commissioner, however, have exempted the Roman Catholic Church from the strictures of the law and from the government's enforcement efforts.

34. The illegal activities of the USCC and the NCCB and the refusal and failure of the Secretary and the Commissioner to enforce the Code and the Constitution have substantially harmed the plaintiffs in numerous ways.

35. The Code gives to qualifying non-profit organizations a choice: either an organization can choose to forego participation in political campaigns for public office in exchange for a tax exemption under § 501(c) (3) of the Code, or it can elect to participate in political campaigns and pay taxes.

36. There is a significant difference between the two situations in addition to the tax status of the organizations: contributions by individual or corporate taxpayers to a § 501(c) (3) organization are deductible by the contributors on their individual tax returns. Contributions to non-tax-exempt organizations are not deductible. (Contributions to organizations exempt under § 501(c) (4) of the Code are also not deductible, although the organizations themselves do not pay taxes.)

37. As the tax deductibility of contributions is an important factor in fund-raising, it is generally considered easier for a § 501(c) (3) organization to raise funds than

for organizations which are not exempt, or are exempt under § 501(c) (4).

38. Plaintiffs ARM, NWHN, Nassau-NOW and their officers, members and contributors (including, without limitation, plaintiffs Lader, Bostrom, Strahl, Edey and Smith) have all abided by the applicable Code provisions.

39. ARM and NWHN, as § 501(c) (3) organizations, and Nassau-NOW, as a § 501(c) (4) organization, have refrained from endorsing or opposing candidates for public office in order to preserve their favorable tax status, and, for ARM and NWHN, in order to be able to offer tax deductions to their contributors.

40. The failure and refusal of the Secretary and the Commissioner to enforce the Code against the Roman Catholic Church, however, has put these plaintiffs at a significant disadvantage in the public debate on abortion. The Church has, with impunity, attracted and used tax-exempt, tax-deductible dollars to elect candidates sympathetic to its position, whereas the plaintiffs cannot and have not done so.

41. Thus, abortion rights organizations and individuals including the plaintiffs, who acted in conformity to the Code, do not enjoy the same financial and political advantages granted illegally to the Roman Catholic Church by the Secretary and the Commissioner. In the inherently competitive political arena an advantage granted to one competitor automatically constitutes a handicap to the others.

42. Plaintiffs Rabbi Margolies, Reverend Blair, Rabbi Brickner, Reverend Hare and Reverend Lutz are harmed by defendants' activities in two ways. These plaintiffs are law-abiding clergymen, whose religious views on abortion are diametrically opposed to those of the Roman Catholic Church. Unlike the Church, however, these plaintiffs have had to and do refrain from participating in political

campaigns, for fear of losing the tax exemption of their congregations and churches.

43. The failure of the government defendants to apply the Code equally to the Roman Catholic Church is in effect a subsidy of the Church's efforts to further its religious aims in the political sphere, a subsidy not granted to law-abiding religious organizations and clergy such as the plaintiffs, who hold contrary religious beliefs. This constitutes an unconstitutional establishment of religion.

44. Plaintiffs Laurel Clinic, Dr. Vuitch, Women's Center for Reproductive Health, The Federation of Feminist Women's Health Centers, Inc., Harrisburg Reproductive Health Services, and Hagerstown Reproductive Health Services, Inc., who all derive income from the performance of abortions, have lost income and are threatened with substantial further losses, if not being put out of business altogether, because of the past and potential future successes of the Church's government-subsidized intervention in political campaigns in support of candidates dedicated to restricting or eliminating the right to abortions.

45. Plaintiff Women's Health Services, Inc., is threatened with having its abortion clinic closed down entirely if the Church's government-subsidized political efforts succeed.

46. Plaintiffs Delgado, Lifrieri, Walsh, Luciano, Michalski, Niebrzydowski and Seibel contribute to the Roman Catholic Church. These religiously-compelled contributions, however, are being used by the Church, with defendants' approval, illegally and for purposes inconsistent with these plaintiffs' religious and secular beliefs.

47. Plaintiffs DeCrow and Sherer and the other plaintiffs who are taxpayers and voters are harmed in two ways.

48(a). As taxpayers, they are harmed because the government's subsidy of the Roman Catholic Church's illegal

political activities is the equivalent of a government expenditure to establish a religion in violation of the First Amendment to the Constitution.

(b). As voters, they are harmed by the unequal enforcement of the Code by the Secretary and the Commissioner which constitutes an illegal, unfair and unconstitutional distortion of the political process by the government and impairs and diminishes plaintiffs' right to vote.

49. An actual controversy exists between plaintiffs and defendants, and plaintiffs have no adequate remedy at law to rectify their losses and alleviate their harms.

50. Upon information and belief, the Secretary and the Commissioner have not established any internal administrative procedures which would allow plaintiffs to obtain administratively the relief they seek in this Court.

COUNT ONE

51. Plaintiffs repeat and reallege the allegations of paragraphs 1-50 herein.

52. The activities of the Roman Catholic Church violate § 501(c) (3) of the Code and the First Amendment to the Constitution.

COUNT TWO

53. Plaintiffs repeat and reallege the allegations of paragraphs 1-50 and 52 herein.

54. The failure and refusal of the Secretary and the Commissioner to revoke the tax exemption of the Roman Catholic Church constitute an unconstitutional establishment of religion by the federal government in violation of the Constitution.

COUNT THREE

55. Plaintiffs repeat and reallege the allegations of paragraphs 1-50, 52 and 54 herein.

56. The failure and refusal of the Secretary and the Commissioner to revoke the tax exemption of the Roman Catholic Church deny plaintiffs due process, including the equal protection of the laws, in violation of the Fifth Amendment to the Constitution.

COUNT FOUR

57. Plaintiffs repeat and reallege the allegations of paragraphs 1-50, 52, 54 and 56 herein.

58. The failure and refusal of the Secretary and the Commissioner to revoke the tax exemption of the Roman Catholic Church constitute the establishment of a religious test as a qualification for public office in violation of Article VI, Clause 3 of the Constitution.

COUNT FIVE

59. Plaintiffs repeat and reallege the allegations of paragraphs 1-50, 52, 54, 56 and 58 herein.

60. The failure and refusal of the Secretary and the Commissioner to revoke the tax exemption of the Roman Catholic Church constitute a failure by the Secretary and the Commissioner to perform their respective ministerial duties under law to enforce the Code and the Constitution.

WHEREFORE, plaintiffs respectfully demand judgment against defendants as follows:

a) declaring the political activities of the Roman Catholic Church to be in violation of the Code and the Constitution;

b) declaring the inaction by the Secretary and the Commissioner to be in violation of the Code and the Constitution;

c) ordering the Secretary and the Commissioner to take all actions necessary or appropriate to enforce the Code and the Constitution, including without limitation, revoking the tax exemption of the Roman Catholic

Church under § 501(c)(3) of the Code, assessing and collecting all taxes due thereby, and notifying or causing the Church to notify contributors to the Church that they are not entitled to deduct such contributions on their individual tax returns;

d) awarding plaintiffs the costs and disbursements of this action, including reasonable attorneys' fees;

e) awarding plaintiffs such other and further relief as the Court may deem just and proper.

Dated: New York, New York
January 30, 1981

/s/ Steven Delibert

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE that upon the annexed memorandum, the defendants Donald T. Regan, Secretary of the Treasury, and Roscoe L. Egger, Jr., Commissioner of Internal Revenue, will move this Court, in a session to be held on the 29th day of May 1981 at 10:00 in the forenoon of that day, or as soon thereafter as counsel may be heard, for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure dismissing the complaint in the within action for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, and for such other and further relief as to this Court may seem proper and just.

Dated: New York, New York
March 30, 1981

Yours, etc.,

JOHN S. MARTIN, JR.
United States Attorney
Southern District of New York

By: /s/ William J. Brennan
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Roy L. Reardon, sworn to on May 26, 1981, and upon all the pleadings and proceedings had herein defendant United States Catholic Conference will move this Court, on the 3rd day of July, 1981 at 4:00 in the afternoon of that day, or as soon thereafter as counsel may be heard, at the United States Courthouse, Foley Square, New York, New York, for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure dismissing the amended complaint herein for plaintiffs' lack of standing, the lack of judicial reviewability, failure to state a claim upon which relief can be granted and the unconstitutionality of § 501(c)(3) of the Internal Revenue Code, and for such other and further relief as to this Court may seem proper and just.

Dated: New York, New York
May 26, 1981

Respectfully submitted,

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District
 Director

United States Catholic Conference
 1312 Massachusetts Avenue, N.W.
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Person to Contact:

M. Schreiber

Telephone Number:

(301) 962-4769

Refer Reply to:

EO: 7204

Date:

June 16, 1980

Dear Sir or Madam:

In a ruling dated March 25, 1946, we held that the agencies and instrumentalities and all educational, charitable and religious institutions operated, supervised, or controlled by or in connection with the Roman Catholic Church in the United States, its territories or possessions appearing in the Official Catholic Directory for 1946, are entitled to exemption from Federal income tax under the provisions of section 101(6) of the Internal Revenue Code of 1939, which corresponds to section 501(c)(3) of the 1954 Code. This ruling has been updated annually to cover the activities added to or deleted from the Directory.

The Official Catholic Directory for 1980 shows the names and addresses of all agencies and instrumentalities and all educational, charitable, and religious institutions oper-

ated by the Roman Catholic Church in the United States, its territories and possessions in existence at the time the Directory was published. It is understood that each of these is a nonprofit organization, that no part of the net earnings thereof inures to the benefit of any individual, that no substantial part of their activities is for the promotion of legislation, and that none are private foundations under section 509(a) of the Code.

You have certified that all elementary schools, high schools, and colleges listed in the Directory have a publicized policy of racial nondiscrimination as to students so that applicants of all races have equal access to each educational institution.

Revenue Procedure 75-50, published in Cumulative Bulletin 1975-2, page 587, sets forth guidelines and record-keeping requirements for determining whether private schools exempt from tax have racially nondiscriminatory policies as to students. You must comply with this Revenue Procedure.

Based on all information submitted, we conclude that the agencies and instrumentalities and educational, charitable, and religious institutions operated, supervised or controlled by or in connection with the Roman Catholic Church in the United States, its territories or possessions appearing in the Official Catholic Directory for 1980 are exempt from Federal income tax under section 501(c)(3) of the Code.

You and your subordinates are not required to file Federal income tax returns as long as a tax-exempt status is maintained. But under section 512(a)(1) of the Code, the unrelated business taxable income derived by any organization from any unrelated trade or business is subject to unrelated business income tax. If you or your subordinates are subject to this tax, you must file an income tax return on Form 990-T, Exempt Organization Business Income Tax Return.

You are not required to file Form 990, Return of Organization Exempt from Income Tax, if you meet the exception in section 6033(a)(2)(A)(i) of the Code. Your subordinates are also not required to file Form 990 if they qualify as churches or integrated auxiliaries of churches or otherwise meet the exceptions in section 1.6033-2(g) of the Income Tax Regulations.

You and your subordinates are not liable for social security (FICA) taxes. However, you or any of your subordinates, in their own right, may file a certificate waiving exemption from taxes, Form SS-15, under the Federal Insurance Contributions Act. You and your subordinates are not liable for tax under the Federal Unemployment Tax Act (FUTA).

Donors may deduct contributions to the agencies, instrumentalities and institutions referred to above, as provided by section 170 of the Code. Requests, legacies, devises, transfers, or gifts to them or for their use are deductible for Federal estate and gift tax purposes under sections 2055, 2106 and 2522 of the Code.

Next year, within 45 days after the close of your annual accounting period, or by May 31, the date established by our letter of April 28, 1975, which gave an extension of time to file the information, please send one copy of the Official Catholic Directory for 1980 for each Internal Revenue District in which one or more of your subordinates are located, with four additional copies to this office.

Group Exemption Number 928 has been assigned to you. You are required to include this number on each Form 990 and Form 990-T required to be filed by your subordinates. Please advise your subordinates of this requirement and provide them with the Group Exemption Number.

In addition, please submit the following, annually, on or before May 31 to the

Internal Revenue Service Center
11601 Roosevelt Boulevard
Philadelphia, Pennsylvania 19155
Attention: Entity Control Unit

1. A statement that the information upon which your present group exemption letter is based applies to any new subordinates;
2. A list of the names, mailing addresses, including ZIP codes, of the subordinates on your group exemption roster that during the year:
 - (a) changed names or addresses;
 - (b) were deleted from the roster;
 - (c) were added to the roster.
3. A statement that each has given you written authorization to add its name to the roster;
4. A list of those to which the Service previously issued separate ruling or determination letters relating to exemption; and
5. A statement that none of the new subordinates are private foundations as defined in section 509(a).

Please use the employer identification number assigned to you on all returns you file and in all correspondence with the Internal Revenue Service.

This is a determination letter. Please retain it with your permanent records. Thank you for your cooperation.

Sincerely yours,

/s/ Lula L. Lang
for TEDDY R. KERN
District Director

cc: Wilfred R. Caron, General Counsel
United States Catholic Conference

Plaintiffs' Affidavits in Opposition to Motion to Dismiss
(Captions Omitted in Printing)

**AFFIDAVIT OF PLAINTIFF
ABORTION RIGHTS MOBILIZATION, INC.
and LAWRENCE LADER**

LAWRENCE LADER, being duly sworn, says:

1. I am a plaintiff in this action. I am a citizen of the United States, residing in New York City, and am a taxpayer and a registered voter.

2. I am a founder and the president of Abortion Rights Mobilization, Inc. ("ARM") which is also a plaintiff in this action. ARM, a non-profit, tax-exempt organization under § 501(c)(3) of the Internal Revenue Code, is dedicated to securing and implementing the guarantee of a woman's right to a legal abortion in the United States. We are a national organization and have conducted public education campaigns and instituted lawsuits concerning aspects of abortion rights in various parts of the nation.

3. I am a writer. I have written a number of books on abortion rights and other family planning issues, including a biography of Margaret Sanger, a book entitled "Abortion", published in 1966 and a book called "Abortion II" published in 1973. I have also been active in the abortion rights movement and was one of the founders and principal officers of the National Association to Repeal the Abortion Laws ("NARAL").

4. Throughout my research, writing and other work on abortion rights, I have come across numerous violations of the separation of church and state that have been committed by the anti-abortion forces. In recent years the problem has been compounded by the activities of the federal government which has permitted the Roman Catholic Church to violate the Constitution and the tax code and participate in political campaigns without any adverse effect on the Church's tax-exempt status.

5. I deeply and sincerely believe in the separation of church and state which is at the heart of the First Amendment. It grieves me to see the government, particularly the Internal Revenue Service, ignore the Constitution and administer the tax code in such a manner as to favor the Catholic Church.

6. The actions of the federal government in subsidizing the illegal political activities of the Catholic Church violate my right to live in a society free of a governmentally-established religion.

7. The government's position also unfairly distorts the political process and violates my and my organization's right to equal protection of the laws.

8. Because ARM is tax-exempt it cannot engage in electoral politics. This limits ARM's ability to have its program enacted. ARM is willing to accept such a limitation because its tax-exempt status assists ARM in raising funds for its activities.

9. The Catholic Church is also tax-exempt. Under the law it, too, should not be permitted to intervene in political elections. The Internal Revenue Service, however, has exempted the Church from the prohibition on electoral politics.

10. This gives the Church a double advantage which is denied to ARM and other religious institutions and abortion rights organizations. The government permits the Church to use its tax-exempt status to raise money more easily by offering tax deductions to its contributors, and then to use this tax-exempt and tax-deductible money to support or oppose candidates.

11. Because we are required to obey the law while the government allows the Church not to obey the law, Abortion Rights Mobilization, Inc. is thus denied equal protection of the law.

12. Moreover, since the government is in effect granting a subsidy to one of the chief protagonists in the abortion rights debate, the government is making it easier for that side to get its message across to voters. Since the same subsidy is denied to the Church's opponents, the government is distorting the political process in favor of the Catholic Church's position.

13. Thus the government's actions violate my right as a citizen and as a voter to participate in a fair electoral process, one that has not been weighted by the government in favor of one position or another.

14. ARM and I have brought this lawsuit, together with the other plaintiffs, to urge the Court to redress these violations of our constitutional rights under the First and Fifth Amendments and to require the government not to change our tax status, but to apply the law equally to all, including the Catholic Church.

/s/ Lawrence Lader
LAWRENCE LADER

Sworn to before me this 14th day of July, 1981.

/s/ Marshall Beil
Notary Public

**AFFIDAVIT OF PLAINTIFF
MARGARET O. STRAHL, M.D.**

MARGARET O. STRAHL, M.D., being duly sworn, says:

1. I am a plaintiff in this action. I am a citizen of the United States, a taxpayer and a voter. I reside in Pelham, New York.

2. I donate money to Abortion Rights Mobilization and to other tax-exempt organizations fighting to safeguard the right of a woman to have a legal abortion. Under the tax code, none of the money I donate to these groups can be used to aid pro-choice candidates for public office. Therefore, I also donate to pro-choice candidates, some of whom have been the subject of direct attacks by the Roman Catholic Church because of their position against abortion. Except for a small tax credit, my donations to political candidates are not tax-deductible.

3. It grieves me that the government has failed to enforce the law against the Roman Catholic Church and has permitted it to intervene in political campaigns without any effect on the Church's tax status. In my view, this constitutes an establishment of religion by the government and violates the doctrine of the separation of church and state.

4. The government's sanction of the Church's illegal activities in the political arena diminishes the effectiveness of my contributions to pro-choice organizations and candidates. The tax-exempt groups I support are prohibited from engaging in electoral politics and the candidates I support cannot raise tax-deductible contributions. The government is allowing the Church, however, to use tax-exempt money in political campaigns. Since these contributions cost the Church's donors half as much as my donations to candidates cost me, the Church and its donors can get twice as much benefit from the same dol-

lar as I can. Thus, in addition to violating my rights under the First Amendment, the government is denying me and the organizations and candidates I support equal protection of the law.

5. I am not participating in this suit to change the taxation of money I donate or to change ARM's tax status. I request only that I not be denied equal protection of the law and that my right to live in a society free of an established religion not be infringed upon. The government should be required to apply the same rules to the Catholic Church and its contributors that it applies to me.

/s/ Margaret O. Strahl
MARGARET O. STRAHL, M. D.

Sworn to before me this 10th day of July, 1981.

/s/ Patricia A. Prisco
Notary Public

**AFFIDAVIT OF PLAINTIFF
HELEN W. EDEY, M.D.**

HELEN W. EDEY, M.D., being duly sworn, says:

1. I am a plaintiff in this action. I am a citizen of the United States, a taxpayer and a voter. I reside in Vineyard Haven, Massachusetts.

2. I feel I have been severely damaged by the illegal use by the Roman Catholic Church defendants of tax-deductible money in political campaigns.

3. I strongly support organizations and political candidates who oppose restrictions on a woman's right to choose to have an abortion. Individually and with my husband I contribute thousands of dollars (\$5,000 to \$10,000 a year and often more) to candidates who support this position. None of these donations (except for the first one hundred dollars) is tax deductible. But, if my political contributions were tax deductible I, like others in my tax bracket, could afford to give twice that amount.

4. Unlike me, the Catholic Church and the people who contribute to it have been permitted to make contributions to candidates they favor using tax-deductible money. Since their tax-deductible donations cost them half as much as mine cost me, the Church and its contributions can get twice as much benefit from the same dollar as I can. This denies me equal protection of the law.

5. My husband and I give about half our income to 501(c)(3) organizations, including Abortion Rights Mobilization ("ARM"). None of this money can be used to aid "pro-choice" political candidates we favor. This puts our efforts at a significant disadvantage in comparison with the effect similar contributions can have when given to the Church. The Church can use and has used these tax-deductible contributions to support political candidates we oppose. Our money, however, cannot be used to

support political candidates we favor and who are opposed by the Church's tax-deductible dollars.

6. I do not seek in this lawsuit to change the taxation of money I give away or to change ARM's tax status. I request only that I not be denied equal protection of the law—that the Catholic Church and its contributors be required to follow the same rules I do.

STATE OF MASSACHUSETTS

ss

COUNTY OF DUKES COUNTY

/s/ Helen W. Edey
HELEN W. EDEY

Sworn to before me this 1st day of June, 1981.

/s/ Jean Swift
Notary Public

**AFFIDAVIT OF PLAINTIFF
RUTH P. SMITH**

RUTH P. SMITH, being duly sworn, says:

1. I am a plaintiff in this action. I am a citizen of the United States, a taxpayer and a voter. I reside in New York, New York.

2. I have been very active in the movement to secure the right of women to have legal abortions. I also donate money to abortion rights organizations and other tax-exempt organizations that support this cause. Under the tax code, none of the money I donate to these groups can be used to aid pro-choice candidates for public office. Therefore, I also donate to pro-choice candidates, some of whom have been subject to direct attacks by the Roman Catholic Church because of their position on abortion. Except for a small tax credit, my donations to political candidates are not tax-deductible.

3. It grieves me that the government has failed to enforce the law against the Roman Catholic Church and has permitted it to intervene in political campaigns without any effect on the Church's tax status. In my view, this constitutes an establishment of religion by the government and violates the doctrine of the separation of church and state.

4. The government's sanction of the Church's illegal activities in the political arena diminishes the effectiveness of my contributions to pro-choice organizations and candidates. The tax-exempt groups I support are prohibited from engaging in electoral politics and the candidates I support cannot raise tax-deductible contributions. The government is allowing the Church, however, to use tax-exempt money in political campaigns. Since these contributions cost the Church's donors half as much as my donations to candidates cost me, the Church and its donors can get twice as much benefit from the same dol-

lar as I can. Thus, in addition to violating my rights under the First Amendment, the government is denying me and the organizations and candidates I support equal protection of the law.

5. I am not participating in this suit to change the taxation of money I donate or to change ARM's tax status. I request only that I not be denied equal protection of the law and that my right to live in a society free of an established religion not be infringed upon. The government should be required to apply the same rules to the Catholic Church and its contributors that it applies to me.

/s/ Ruth P. Smith
RUTH P. SMITH

Sworn to before me this 10 day of July, 1981.

/s/ Elizabeth L. Hancroft
Notary Public

**AFFIDAVIT OF
NATIONAL WOMEN'S HEALTH NETWORK, INC.**

BELITA COWAN, being duly sworn says:

1. The National Women's Health Network, Inc. is a plaintiff in this action.

2. I am the Executive Director of the National Women's Health Network, Inc. (hereinafter referred to as "the NWHN, Inc.").

3. The purposes of the NWHN, Inc. include research and dissemination of health information to women, encouraging women to take responsibility for their health care and improving the quality of health care. Abortion rights are integral to our purposes. The advancement of both safe and legal contraception and safe and legal abortion fall within the definition of safe health care that must be provided to the women of our country. Lack of access to safe and legal abortion impacts directly on the health status of American women.

4. NWHN also fosters research and activities in several other areas that directly effect the health of women. Among these are infertility, teenage pregnancies, child-birth technology and a myriad of other issues that are important to the health and safety of American women. Our position has always been to encourage the improvement of maternal and infant health care services so that the infant mortality rate will be lowered. It is the interest of American women to have ready access to safe child-birth facilities and give birth to healthy babies. One of our member groups, of which there are more than two hundred eighteen, is the American Foundation of Maternal and Child Health. Additionally, in our effort to aid those women who want to have children and those women who cannot have children, we have established a special committee on infertility. This has been in response to a demand. At our Board of Director's Meeting, in Febru-

ary, 1981, we held a special educational program on infertility. Our purposes, then, include freedom of choice for all women. We are extremely concerned with the safety of women in their childbearing years.

5. NWHN, Inc. is exempt from taxes under sec. 501(c)(3).

6. The dues-contributing membership of NWHN, Inc. consists both of individuals and of organizations, including clinics which provide among other care abortion services. The New Hampshire Feminist Health Center (hereinafter referred to as "the Center") is one of our many member clinics. The Center performs a wide range of reproductive health services including the performance of abortions, fertility awareness counseling, the maintenance of a twenty-four hour hotline and the education of women about natural birth control methods. The Center is engaged in a major research project on the cervical cap, a safe and effective method of birth control. The Center is working in conjunction with NWHN, Inc. on this project. The Center is also exempt from taxes under sec. 501(c)(3).

7. The National Women's Health Network would intervene in political campaigns as a means of achieving its purposes but for the fact that it would lose its exemption under sec. 501(c)(3) if it did so.

8. Upon information and belief, the New Hampshire Feminist Health Center would intervene in political campaigns but for the fact that it would lose its exemption under sec. 501(c)(3) if it did so.

9. The Roman Catholic Church's practice of intervening in political campaigns while enjoying exemption under sec. 501(c)(3) injures the NWHN, Inc. because the Church thereby gains an unfair advantage in communicating with voters and legislators about abortion. In my experience, political endorsements are an extremely

powerful way of influencing voters' opinions and actions. Because of this, an endorsement influences the political stance not only of the candidate endorsed but of many other legislators and candidates as well. NWHN, Inc.'s forbearance from such political activity is a significant detriment to accomplishing its purposes in improving the health care system for women. When the Church is permitted to make endorsements without suffering the legally prescribed financial consequences, the NWHN, Inc. is substantially harmed in carrying out its purposes since the Church is breaking the law and thereby gains an advantage, while the NWHN, Inc. has remained within the law and has thereby suffered a relative detriment making the Church's advantages unfair. If the relief sought in this action were granted, the NWHN, Inc.'s injury would be redressed. Donations to the Church's anti-choice activities would no longer be deductible by the donor. In addition, the amount of income which the Church could retain for its own purposes would be reduced by the amount of income tax due.

10. To counteract the political effects of the defendants' illegal activities, the NWHN, Inc. has been required to divert money away from activities that would directly and affirmatively increase reproductive choice such as increased expenditures on safe contraceptive methods which would lessen the need for abortion. Instead of funding such research, which NWHN, Inc. would otherwise do, the Network has had to fund education activities merely to prevent the extinction of already existing abortion rights. At the present time in excess of nine percent (9%) of our budget is spent on this endeavor. If it were possible, we would expand our budget in several areas. For example, we are only able to budget a small amount for our fertility project since we have to concentrate on preserving women's rights to safe and legal abortions. We feel that this is an undue hardship and interferes with our overall goals. It deprives our individual mem-

bers and member groups of services we would otherwise provide.

11. The NWHN, Inc. is participating in this lawsuit to urge the Court to redress the violation of the application of sec. 501(c)(3) since it has been unequally applied. We do not wish to alter our tax status. We urge only that the law be enforced.

/s/ Belita Cowan
BELITA COWAN
Executive Director of
National Women's Health Network

Sworn to before me this 16th day of July, 1981.

/s/ Stuart F. Balderson
Notary Public

**AFFIDAVIT OF PLAINTIFF
LONG ISLAND NATIONAL ORGANIZATION
FOR WOMEN, NASSAU, INC.**

NORMA LEVY, being duly sworn, says:

1. I am president of the Long Island National Organization for Women, Inc. ("Nassau NOW"), a plaintiff in this action. Nassau NOW is a non-profit membership organization exempt from taxes under § 501(c)(4) of the Internal Revenue Code. We and our members are dedicated to the promotion of women's rights, including the right to have an abortion.

2. As a tax-exempt organization we are prohibited from engaging in electoral politics. We are content to abide by this restriction in exchange for our tax deduction provided that the other tax-exempt organizations who have similar restrictions are required by the government to live with them as well.

3. The government has failed to do this, however. The Internal Revenue Service has let the Roman Catholic Church engage in electoral politics without any effect on the Church's tax status.

4. This violates our right to equal protection of the laws. We are prevented from trying to influence the outcome of specific elections, but one of our chief opponents is not. This government allows the Church to be doubly effective—to be tax-exempt *and* political.

5. Thus the government provides an illegal tax shelter for the anti-abortion forces, and gives the Church an unfair advantage in the political arena.

6. As the Court is undoubtedly aware, money is a very powerful tool in politics. Since the government prohibits Nassau NOW (unlike the Catholic Church) from entering the electoral process and prevents our members (unlike donors to the Church) from deducting our po-

litical contributions, our effectiveness in influencing the political process is much diminished when compared to the Church.

7. We urge the Court to redress the governmental violation of our and our members' rights to equal protection of the laws and to require the Internal Revenue Service to enforce the law even-handedly and equally against all.

/s/ Norma Levy
NORMA LEVY

Sworn to before me this 14th day of July, 1981.

/s/ Harriet J. Morosoff
Notary Public

**AFFIDAVIT OF PLAINTIFF
RABBI ISRAEL MARGOLIES**

RABBI ISRAEL MARGOLIES, being duly sworn, says:

1. I am a plaintiff in this action. I am a citizen of the United States, a taxpayer and a voter. I reside in New Jersey.

2. Since 1941 I have been an ordained rabbi of the Jewish faith. I am currently rabbi of Beth Am, the People's Temple, located in New York, New York. I also have a doctorate in theology.

3. It is a basic principle of Judaism that the individual is free to make decisions in the light of his or her own conscience. Abortion is basic to the life of a woman; to deny it would deprive her of a basic right. I am concerned about the fully developed entity that is woman. To force a woman to bring an unwanted fetus into the world is a serious abridgement of the Bible and the Constitution.

4. I have always refrained from using my religious position to support political candidates, because I feel very strongly about the separation of church and state. I believe that any such political activity by me would violate this constitutionally-established doctrine and would also be illegal under the tax code, which prohibits intervention in political campaigns by churches or temples which have tax exemptions.

5. There have been well-publicized instances in which leaders of the Catholic Church have not obeyed the law and have supported or denounced candidates from the pulpit. The Internal Revenue Service seems to have done nothing about these violations of law.

6. When the rules prohibiting religious institutions and religious leaders from participating in political campaigns are not enforced equally against all religions, this constitutes an establishment of religion by the government

in favor of whichever religious body is allowed to violate the law with impunity.

7. Thus, the government gives an extra advantage to the Roman Catholic Church, an advantage that is particularly offensive to me because I am of a different religion and the Church is using its advantage to persuade the civil authorities to adopt a doctrine which is inimical to my deeply-held religious beliefs.

8. The government, therefore, is violating my right to live in a society in which no religion is favored or established by the state and in which there is a strong wall separating religious activities from secular, political activities.

9. The government's favoritism towards the Catholic Church also denigrates my standing and the standing of my religion in the community. We are made to feel that we are second class citizens because we are not permitted to violate the law with impunity and because the government appears to consider our views not to be as worthy of attention as those of the Catholic Church.

10. I have joined this suit to urge this Court to redress this injury by requiring the government to enforce the law evenhandedly—to permit no religious institution and no religious leader to violate the tax code and to speak out from the pulpit in favor of one political party or another.

/s/ Israel Margolies
RABBI ISRAEL MARGOLIES

Sworn to before me this 15th day of July, 1981.

/s/ Marshall Beil
Notary Public

AFFIDAVIT OF PLAINTIFF REVEREND BEATRICE BLAIR

REVEREND BEATRICE BLAIR, being duly sworn, says:

1. I am a plaintiff in this action. I am a citizen of the United States residing in New York; I am a taxpayer and a voter.

2. I am an ordained Priest of the Episcopal Church. I presently serve as Associate Rector of the Church of the Heavenly Rest in New York City.

3. I am also chair of the board of National Abortion Rights Action League ("NARAL") and on the board of the New York City Metro Religious Coalition for Abortion Rights. I also served on the board of National Planned Parenthood.

4. I have joined in this lawsuit because I believe that the government's failure to enforce the law against the Roman Catholic Church results in an unconstitutional establishment of religion. This establishment violates my sincere and deeply held belief in the separation of church and state and denigrates the status of my religion and religious beliefs.

5. I believe that humans are made in the image of God. No one should stand between each of us and God in the decision-making process. A woman has the right to make decisions in accordance with her belief of what course is best for her and all others involved.

6. In my belief and in Episcopal theology, abortion is often justified. For any number of reasons a pregnancy or a birth can result in tremendous suffering and women and families must struggle to decide whether the suffering imposed by the pregnancy or birth would be worse than termination of the pregnancy. In circumstances where it would be, it is part of Episcopalian doctrine that

women and families should be free to choose to terminate such pregnancies.

7. The Roman Catholic Church takes a different view of the morality of abortions. I understand that the Church believes abortions to be immoral and unjustifiable.

8. I do not quarrel with the Catholic Church's right to express its viewpoint. What I do object to, however, is the benefit conferred upon the Catholic Church by the government's failure to enforce the legal prohibition against using religious facilities and money for partisan political activities.

9. As I understand the tax code, a minister such as myself is prohibited from using his or her religious position to oppose political candidates. Such acts, in my view, not only violate the tax code, but would also be a violation of the separation of church and state. Because of this I have refrained from using my religious affiliation to endorse candidates although on occasion I would have liked to do so in order to aid the abortion rights movement.

10. The Internal Revenue Service, however, has permitted the Catholic Church to do just what the law does not allow it. This, in my view, constitutes an establishment of religion by the government since the state is conferring a benefit on the Catholic Church which it does not give other churches, such as the Episcopal Church.

11. That a benefit is given to the Catholic Church and denied to my church offends my very strong belief in the separation of church and state. Moreover, since the Catholic Church is using its government subsidy to put into effect a doctrine I am opposed to, the government's actions portend very grave dangers for my own religious beliefs.

12. The government's action also demeans my church's and my religion's standing and reputation in the commu-

nity. The Catholic Church is permitted to violate the law with impunity in very well-publicized instances whereas my Church and my religion conform to the law. To me and surely to members of the public at large it appears that Catholic doctrine is being favored by the government and, therefore, must be more correct than my religion's teachings.

13. The Constitution prohibits the government from favoring or establishing any one religion over any other. The government is violating this fundamental principle by permitting the Catholic Church to break the law while no one else is given the same liberty. I urge the Court to redress this substantial violation of my constitutional rights.

/s/ Beatrice Blair

REVEREND BEATRICE BLAIR

Sworn to before me this 13th day of July, 1981.

/s/ Florence Manning
Notary Public

**AFFIDAVIT OF PLAINTIFF
RABBI BALFOUR BRICKNER**

RABBI BALFOUR BRICKNER, being duly sworn, says:

1. I am a plaintiff in this action. I am a citizen of the United States, a voter and a taxpayer. I reside in New York, New York.

2. I am the Senior Rabbi of the Stephen Wise Free Synagogue in New York City and have been a Reform Jewish rabbi for nearly 30 years.

3. Under Reform Judaism, a fetus is not considered a full human being and has no juridical personality of its own. Jewish law does not equate abortion with murder. While Jewish law teaches a reverend and responsible attitude towards the question of life and thus views abortion with great concern, under Jewish law, reasons affecting basic life and health may sanction or even require therapeutic abortion.

4. These beliefs are contrary to those of the Roman Catholic Church as well as other religious groups. I respect and welcome that diversity. The wall of separation between church and state erected by our Constitution encourages religious diversity and puts all religious beliefs on an equal footing with regard to the state.

5. Under the First Amendment the state must refrain from favoring any one religion over another. This is a basic tenet of freedom in this country and one with which I am most concerned. This freedom, however, is under severe attack because of the government's refusal to enforce the tax code and the Constitution against the Roman Catholic Church.

6. When the Internal Revenue Service does not penalize the Church when it illegally supports or opposes candidates for election, this government undermines the principle of church-state separation.

7. The government is in effect creating a climate in which the views of one religion—Catholicism—is tacitly but noticeably favored over others. The disfavored religions, such as Judaism are made to feel like second class citizens whose status is not as significant or as important as that of the Catholic Church.

8. The government's attitude threatens more than my religious beliefs; it also represents a health threat of the Jewish people in this country. Jewish women are particularly subject to Tay-Sachs disease—a genetic infirmity fatal to infants. No Tay-Sachs child has ever lived beyond five years of age and they die an agonizing death.

9. Tay-Sachs disease cannot be detected until the second trimester of pregnancy, but once diagnosed, the availability of abortion allows the parents to choose not to bring into this world a child with such a tragic disease.

10. The government's favoring of the Catholic Church, however, threatens to eliminate the ability of Jewish men and women to take therapeutic action in time to avert this terrible toll on them and their families.

11. In addition to my work at the Stephen Wise Free Synagogue and in other Jewish organizations, I am chairman of the national issues committee of the New York State Liberal Party. The Liberal Party sponsors candidates for election to public offices in New York State.

12. My involvement in this party is as a private citizen. I would not and could not commit my congregation or any other religious institution with which I am associated to a candidate, and I would not and could not tell my congregation how to vote. This would be in violation of the Constitution and I am a strict church-state separationist.

13. The Liberal Party has also been harmed by the government's favoritism of the Catholic Church. My party cannot offer tax deductions to the people who con-

tribute to our candidates (beyond the small tax credit recently added to the tax code). The government, however, is allowing the Catholic Church to use fully tax-exempt and tax-deductible monies to oppose candidates of the Liberal Party. The government's failure to enforce the law against the Church has thus resulted in a significant inequality: candidates opposed to the Liberal Party's position on abortion can receive government-subsidized money in their campaigns—a subsidy we are flatly denied. And in political campaigns, money is an extremely important component of success.

14. I have joined this lawsuit to redress this government-established inequity in the political process and violation of church and state. I appeal to the Court to search the Constitution and the Court's conscience to preserve the freedoms which are so dear to all of us.

/s/ Rabbi Balfour Brickner
RABBI BALFOUR BRICKNER

Sworn to before me this 14th day of July, 1981.

/s/ Marshall Beil
Notary Public

AFFIDAVIT OF PLAINTIFF REVEREND ROBERT HARE

REVEREND ROBERT HARE, being duly sworn, says:

1. I am a plaintiff in this action. I am a citizen of the United States and reside in Scarborough, New York and am a taxpayer and a voter.

2. I was ordained as a Presbyterian minister in 1962. I am presently Pastor of the Scarborough Presbyterian Church in Westchester County, New York.

3. Abortion is a tragic choice which may be justified in appropriate circumstances. I am a Presbyterian and my religious and theological grounding for this view is rooted in judgments under the grace of God, under which we all live. This means that in a world of tragedy and sin and in a world of redemptive moments, we always live our lives under both the grace and the judgment of God, and we are enabled by God to make judgments about the best course to follow in complex and trying circumstances.

4. Biblical material is related to my stand on this issue. It is relevant to the question of morality of terminating a pregnancy. The question of morality hinges on an understanding of whether and when the human fetus has become, in fact, fully a human person. My biblical understanding led me to the conclusion that personhood is a divinely given quality in the continuum of life. At what specific point in the continuum it is given we do not precisely know, nor do the scriptures of the Old and New Testament precisely tell us. The Roman Catholic Church asserts that personhood begins from conception, but I don't believe that adequate scholarship of the Old and New Scriptures can allow this conclusion to stand.

5. I am also president of Religious Leaders for Free Choice of Greater Metropolitan New York and a member of various organizations which promote a woman's right to choose to have an abortion.

6. I have never utilized my role as a clergyman to support pro-choice candidates, nor would I want to engage in politics as the pastor of the Scarborough Presbyterian Church.

7. It injures me when the government permits the Catholic Church to become illegally involved in political campaigns. The Church's acts violate the tax code and the constitutionally-based doctrine of separation of church and state.

8. The government's failure to enforce the law against the Catholic Church offends my deeply held and sincere belief in the separation of church and state. The favoritism shown by government to the Catholic Church but not to other religions constitutes, in my view, an establishment of religion in violation of the First Amendment.

9. This establishment of religion by the federal government further violates my rights in that it demeans the status of my own religion and religious beliefs in the community. It offends the dignity of my religion when the state follows a course of action which promotes the activities and views of one church while prohibiting similar activities by every other church. It makes the rest of us appear to be second-class citizens.

10. I urge the Court to resurrect the wall of separation between the church and the state and require the government to enforce the law equally against all religious institutions.

/s/ Robert W. Hare
REVEREND ROBERT HARE

Sworn to before me this 14th day of July, 1981.

/s/ Marshall Beil
Notary Public

**AFFIDAVIT OF PLAINTIFFS
REV. MARVIN G. LUTZ AND
WOMEN'S CENTER FOR REPRODUCTIVE HEALTH**

REVEREND MARVIN G. LUTZ, being duly sworn, says:

1. I am a plaintiff in this action. I am a citizen of the United States, a taxpayer and a voter, and reside in Jacksonville, Florida. I am also Executive Director of the Women's Center for Reproductive Health of Jacksonville, which is also a plaintiff in this action.

2. Since 1963, I have been an ordained Presbyterian minister.

3. In 1970 the 110th General Assembly of the Presbyterian Church in the United States adopted a position on abortion which recognized the freedom of a woman to choose to have an abortion as an alternative for terminating a pregnancy. After much research and debate the General Assembly recognized that the needs of the mother may at times take precedence over the needs of an embryonic and unformed child, and concluded that on occasion the wilfull termination of a pregnancy is morally justifiable.

4. Accordingly, the General Assembly adopted on behalf of the Presbyterian Church in the United States a position paper which recognized the right of women to make individual choices and encouraged the Church to provide counselling and assistance to women and families faced with such choices. The position paper also called for the provision of medical care and medical services to all women who desire and need it, and for a change in the laws of this nation to reflect the principles that are set forth in the Church's position paper.

5. The primary function of my ministry in the last few years has been to put these principles of the Presbyterian Church into effect. Thus, I helped found and am now the Executive Director of the Jacksonville Clergy

Consultation Service, Inc., a tax-exempt organization which provides counselling for families and women with unintended pregnancies. I am past-president of the Florida Abortion Council, president of the North Florida Abortion Rights Action League, and active in a number of other abortion rights organizations.

6. My role as a minister can be summarized, thus, as being a public advocate for the religious freedom and civil liberties of women to terminate pregnancies by birth or by abortion. In such a role I have appeared before the Florida Legislature and have made numerous public statements to the media and to others.

7. Within this public ministry, I have refrained from endorsing candidates or intervening in political campaigns for public office. These activities would jeopardize my Church's status as a tax-exempt organization under the Internal Revenue Code and would violate the principles of church-state separation underlying the First Amendment which I hold very dear.

8. The Roman Catholic Church has a quite different position on abortion. It appears to me that the Catholic Church has not hesitated to use the power of its pulpit to influence political elections. These violations of the law by the Catholic Church have been overlooked by the Internal Revenue Service which has allowed the Catholic Church to become political without any adverse effect on its tax status.

9. In my view the tacit exception to the tax code that the government has granted to the Catholic Church constitutes an establishment of religion—the state is favoring the Catholic Church over the Presbyterian Church and others who have different positions on abortion. This violates my right to live in a society free of any such established religion.

10. The government's position in addition denigrates and demeans the teachings of the Presbyterian Church

and my ministry which are opposed to those of the Catholic Church. Since we are not granted the same benefit by the government that the Church has been granted, we are made to appear to be second class citizens.

11. The government's position has also adversely affected the work of the Women's Center for Reproductive Health which is a project of the Jacksonville Clergy Consultation Service. In response to the position paper adopted by the General Assembly, we provide medical services (including abortions), counselling and support to women making decisions about pregnancy, abortion and family life.

12. The success of the Catholic Church's government-backed program has been to cut off all Medicaid abortions. This has cost our clinic thousands and thousands of dollars. Were the Catholic Church's government-subsidized campaign to be entirely successful and abortions made illegal again, this would prohibit Presbyterian and other women from exercising their religious beliefs to choose to have an abortion. It would also put our clinic out of business.

13. The government's subsidy to the Catholic Church, therefore, injures my right to practice my religion and to live in a society in which no religion is favored by the state. I urge the Court to require the government to enforce the law evenhandedly and to require the Catholic Church to abide by the same rules as the rest of us must do.

/s/ Marvin G. Lutz
MARVIN G. LUTZ

Sworn to before me this 10th day of July, 1981.

/s/ Janis Conston-Carr
Notary Public

**AFFIDAVIT OF PLAINTIFF
JENNIE ROSE LIFRIERI**

JENNIE ROSE LIFRIERI, being duly sworn, says:

1. I am a plaintiff in this action. I reside in Hastings-on-Hudson, New York. I am a citizen of the United States, a taxpayer and a voter.

2. I am a practicing Roman Catholic. In fulfillment of the requirements of our faith, my family, among other activities, contributes money to the Church. I disagree with the position on abortion taken by the Church. I believe that, properly interpreted, the principles of Catholicism permit abortion under some circumstances.

3. As I understand the law, the Church cannot endorse or attack political candidates and still be exempt from taxes. Yet the Church does this and does not pay taxes.

4. When the government allows the Church to do this, I am harmed. The Roman Catholic Church is being allowed to use my donations which are religiously compelled, for illegal activities. My money should be used for religious and not political purposes.

5. The United States Constitution separates the church and the state. This doctrine is an important part of our freedom. When the government allows the Church to cross over the line and to extend its power into the voting booth, my rights to live in a society that believes in freedom of religion are damaged.

6. Since there is no redress within the Church, I am asking the Court to require the government to enforce the law to ensure that my money is not spent illegally.

/s/ Jennie Rose Lifrieri
JENNIE ROSE LIFRIERI

Sworn to before me this 10th day of July, 1981.

/s/ Marshall Beil
Notary Public

**AFFIDAVIT OF PLAINTIFF
EILEEN WALSH**

EILEEN WALSH, being duly sworn, says:

1. I am a plaintiff in this action. I reside in Seaford, New York. I am a citizen of the United States, a taxpayer and a voter.

2. I am a practicing Roman Catholic. In fulfillment of the requirements of the Catholic faith, I, among other activities, contribute money to the Church. I disagree with the position on abortion taken by the Church. I believe that, properly interpreted, the principles of Catholicism permit abortion under some circumstances.

3. As I understand the law, the Church cannot endorse or attack political candidates and still be exempt from taxes. Yet the Church does this and does not pay taxes.

4. When the government allows the Church to do this, I am harmed. The Roman Catholic Church is being allowed to use my donations which are religiously compelled, for illegal activities. My money should be used for religious and not political purposes.

5. The United States Constitution separates the church and the state. This doctrine is an important part of our freedom. When the government allows the Church to cross over the line and to extend its power into the voting booth, my rights to live in a society that believes in freedom of religion are damaged.

6. Since there is no redress within the Church, I am asking the Court to require the government to enforce the law and to ensure that my money is not spent illegally.

/s/ Eileen Walsh
EILEEN WALSH

Sworn to before me this 14th day of July, 1981.

/s/ Marshall Beil
Notary Public

**AFFIDAVIT OF PLAINTIFF
PATRICIA SULLIVAN LUCIANO**

PATRICIA SULLIVAN LUCIANO, being duly sworn, says:

1. I am a plaintiff in this action. I reside in Seaford, New York. I am a citizen of the United States, a taxpayer, and a voter.

2. I am a practicing Roman Catholic. In fulfillment of the requirements of the Catholic faith, I, among other activities, contribute money to the Church.

3. I disagree with the position on abortion taken by the Church. I believe that, properly interpreted, the principles of Catholicism permit abortion under some circumstances. When I attend Church, however, I am frequently subjected to illegal one-sided electioneering against political candidates who, like me, do not support the Church's position on abortion.

4. As I understand the law, the Church cannot endorse or attack political candidates and still be exempt from taxes. Yet the Church does this and still does not pay taxes.

5. When the government allows the Church to do this, I am harmed. The Roman Catholic Church is being allowed to use my donations which are religiously compelled, for illegal activities. My money should be used for religious and not political purposes.

6. The United States Constitution separates the church and the state. This doctrine is an important part of our freedom. When the government allows the Church to cross over the line and to extend its power into the voting booth, my rights to live in a society that believes in freedom of religion are damaged.

7. Since there is no redress within the Church, I am asking the Court to require the government to enforce

the law and to ensure that my money is not spent illegally.

/s/ Patricia Sullivan Luciano
PATRICIA SULLIVAN LUCIANO

Sworn to before me this 15 day of July, 1981.

/s/ Marshall Beil
Notary Public

**AFFIDAVIT OF PLAINTIFF
MARCELLA MICHALSKI**

MARCELLA MICHALSKI, being duly sworn, says:

1. I am a plaintiff in this action. I reside in Pittsburgh, Pennsylvania. I am a citizen of the United States, a taxpayer and a voter.

2. I am a practicing Roman Catholic. In fulfillment of the requirements of the Catholic faith, I, among other activities, contribute money to the Church. I disagree with the position on abortion taken by the Church. I believe that, properly interpreted, the principles of Catholicism permit abortion under some circumstances.

3. As I understand the law, the Church cannot endorse or attack political candidates and still be exempt from taxes. Yet the Church does this and does not pay taxes.

4. When the government allows the Church to do this, I am harmed. The Roman Catholic Church is being allowed to use my donations which are religiously compelled, for illegal activities. My money should be used for religious and not political purposes.

5. The United States Constitution separates the church and the state. This doctrine is an important part of our freedom. When the government allows the Church to cross over the line and to extend its power into the voting booth, my rights to live in a society that believes in freedom of religion are damaged.

6. Since there is no redress within the Church, I am asking the Court to require the government to enforce the law and to ensure that my money is not spent illegally.

/s/ Marcella Michalski
MARCELLA MICHALSKI

Sworn to before me this 11th day of July, 1981.

/s/ [Illegible]
Notary Public

**AFFIDAVIT OF PLAINTIFF
CHRIS NIEBRZYDOWSKI**

CHRIS NIEBRZYDOWSKI, being duly sworn, says:

1. I am a plaintiff in this action. I reside in Pittsburgh, Pennsylvania. I am a citizen of the United States, a taxpayer and a voter.

2. I am a practicing Roman Catholic. In fulfillment of the requirements of the Catholic faith, I, among other activities, contribute money to the Church. I disagree with the position on abortion taken by the Church. I believe instead that the principles of Catholicism permit women to use their conscience as a guide in the choice of whether or not to have an abortion.

3. As I understand the law, the Church cannot endorse or attack political candidates and still be exempt from taxes. Yet the Church does this and does not pay taxes.

4. When the government allows the Church to do this, I am harmed. The Roman Catholic Church is being allowed to use my donations which are religiously compelled, for illegal activities. My money should be used for religious and not political purposes.

5. The United States Constitution separates the church and the state. This doctrine is an important part of our freedom. When the government allows the Church to cross over the line and to extend its power into the voting booth, my rights to live in a society that believes in freedom of religion are damaged.

6. Since there is no redress within the Church, I am asking the Court to require the government to enforce

the law and to ensure that my money is not spent illegally.

/s/ Chris Niebrzydowski
CHRIS NIEBRZYDOWSKI

Sworn to before me this 15th day of July, 1981.

/s/ [Illegible]
Notary Public

**AFFIDAVIT OF PLAINTIFF
KAREN DeCROW**

KAREN DECROW, being duly sworn, says:

1. I am a plaintiff in this action. I am a United States citizen, a taxpayer and a registered voter. I reside in Syracuse, New York.

2. I have been a leader in the feminist movement since 1967. One of my highest priorities, and that of the feminist movement, is complete and total freedom of every woman to have the right to choose any form of contraception or abortion she selects.

3. I was the national president of the National Organization for Women ("NOW") from 1974 through 1977. At that time NOW conducted its work on feminist issues, including abortion rights, without the financial benefits that tax-exempt religious organizations had. Unlike the Catholic Church, we could not offer our donors the ability to deduct donations they made to NOW from their personal income tax.

4. This put us at a distinct disadvantage in raising funds since contributions to our organization cost our donors much more than similar contributions cost donors to the Catholic Church. Thus our ability to affect the outcome of elections was diminished by governmental action.

5. I am very interested in politics and, in fact, ran as the Liberal Party candidate for mayor of Syracuse in 1969. I anticipate running for political office again. My views on feminist issues, including abortion rights, are well-known and would undoubtedly be a factor in any political campaign I conduct.

6. Under the law, I would not be able to offer any contributor to my campaign a tax deduction (beyond a small tax credit). The Catholic Church, however, could

oppose me and, because of the government's failure to enforce the law against the Catholic Church, offer tax deductions to people who wish to contribute to my defeat.

7. This government policy thus places me at a significant financial and political disadvantage, and inhibits my ability to enter a political campaign for public office.

8. As a taxpayer, a voter and an attorney, I have always assumed that one of the basic tenets of law in this country—one that is embodied in the First Amendment to the Constitution—is the separation of church and state. It grieves me to see the government violate the Constitution and establish the Catholic Church as the state's favorite religion.

9. I have joined this lawsuit to request that the Court uphold the fundamental constitutional doctrine of church-state separation and redress the harm that I have faced and continue to face as a result of the inequitable enforcement of the tax code by the Internal Revenue Service.

/s/ Karen DeCrow
KAREN DECROW

Sworn to before me this 14 day of July, 1981.

/s/ Norman F. Smitts
Notary Public

AFFIDAVIT OF PLAINTIFF SUSAN SHERER

SUSAN SHERER, being duly sworn, says:

1. I am a plaintiff in this action. I am a citizen of the United States, a taxpayer and a registered voter. I live in Plainview, New York.

2. I have been very active in the abortion rights movement holding a number of important positions in organizations in New York and on Long Island where I live.

3. Throughout my work on abortion rights I have been repeatedly dismayed at the violations of the separation of church and state that have been committed by the anti-abortion forces. The problem has been compounded by the federal government which has permitted the Roman Catholic Church to violate the Constitution and the tax code and participate in political campaigns without any adverse effect on its tax deductible status.

4. I believe passionately in the First Amendment which separates church and state in this society. It grieves me to see the government ignore the law of the land and favor the Catholic Church in the administration of the tax code.

5. The government's position also unfairly distorts the political process. By granting a government subsidy to one of the protagonists in the fierce debate on abortion rights, but not to others, the government makes it easier for that side to raise money and to get its message across to voters.

6. This violates my right as a citizen and a voter to participate in a fair electoral process, free of the inequitable imposition by the government of burdens and advantages on the participants in that process.

7. I urge the Court to redress these violations by requiring the government to apply the law equally to all.

/s/ Susan Sherer
SUSAN SHERER

Sworn to before me this 13th day of July, 1981.

/s/ James H. Bumstead
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 5590 (RLC)

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Plaintiffs,

—against—

DONALD T. REGAN, Secretary of the Treasury;
ROSCOE L. EGGER, JR., Commissioner of Internal Revenue,
Defendants.

NOTICE OF DEPOSITION

Please take notice that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs will take the deposition upon oral examination of the United States Catholic Conference, whose address is 1312 Massachusetts Avenue, N.W., Washington, D.C., by its custodian of records, before a notary public or other person authorized to administer oaths, at 10:00 a.m. on March 21, 1983, at the Office of the United States Attorney for the District of Columbia, Room 2125, United States Courthouse, 3rd and Constitution Avenue, N.W., Washington, D.C. The deposition will continue from day to day until completed.

Please take further notice that the respondent will be served with a subpoena pursuant to which he will be asked to produce at the deposition the documents identified in the annexed Schedule A.

You are invited to attend and cross examine.

Dated: New York, New York
February 18, 1983

Yours, etc.

KARPATKIN POLLET PERLMUTTER
& BEIL

By /s/ Marshall Beil
MARSHALL BEIL
Attorneys for Plaintiffs
708 Third Avenue
New York, New York 10017
Tel. (212) 557-4700

TO: William J. Brennan Esq.
Assistant United States Attorney
Attorney for Defendant
One St. Andrew's Plaza
New York, New York 10007
Tel. (212) 791-1049

SCHEDULE A

Definitions

1. "Document" shall mean any written material, whether typed, handwritten, printed or otherwise recorded, and all tangible things from which information can be processed or transcribed, whether in draft or otherwise, whether or not sent or received, including, without limitation, the original, a copy (if the original is not available) and any non-identical copy (whether different from the original because of underlining, editing marks, notes made on or attached to such copy or otherwise) as well as all underlying supporting or preparatory material and drafts thereof, now in defendants' possession, custody, or control, or available to defendants, their counsel, agents, or representatives.

2. "Documents relating to" a subject shall mean, unless otherwise stated, each document which constitutes, refers or pertains to, discusses, embodies, records, evidences, comments upon or contains any information relating in any way to that subject.

3. "Communication" shall mean any correspondence, memoranda, conversation, meeting, comment, statement, remark, discussion, telephone communication or other form of communication, whether oral or written.

4. "USCC" shall mean the United States Catholic Conference, Inc., and its officers, directors, employees, agents, representatives, attorneys, accountants, and members.

5. "NCCB" shall mean the National Conference of Catholic Bishops, and its officers, directors, employees, agents, representatives, attorneys, accountants, and members thereof.

6. "The Pastoral Plan" means The Pastoral Plan for Pro-Life Activities as approved by the USCC/NCCB on November 20, 1975.

7. Unless the context otherwise clearly requires, documents in each category are to be produced for all years commencing January 1, 1973 to the date of production of the materials called for in this subpoena.

Documents To Be Produced

1. The Pastoral Plan and any drafts thereof which had been circulated to members of the NCCB or the USCC prior to November 20, 1975.

2. The minutes of the USCC/NCCB November 1975 meetings concerning the discussion and adoption of the Pastoral Plan.

3. Documents or information describing or identifying USCC and NCCB members, committees and senior staff personnel who have or have had responsibility for implementing Part IV of the Pastoral Plan ("The Pro-Life Effort in the Congressional District"), including directories or organization charts.

4. Any documents issued, circulated or promulgated by the USCC or the NCCB regarding the implementation of Part IV the Pastoral Plan.

5. Documents maintained by the USCC or the NCCB which reflect the implementation of Part IV of the Pastoral Plan or the activities of congressional district pro-life groups.

6. Church Bulletins, Clergy Bulletins, Pastoral letters, directives, memoranda, or similar documents issued or promulgated by any member of the NCCB or USCC regarding (a) the implementation of Part IV of the Pastoral Plan or the activities of congressional district pro-life groups; or (b) the support or opposition to candidates for public office or political party position.

7. The 1976 statement issued by the NCCB entitled "Political Responsibility: Reflections on an Election Year."

8. a. The minutes of meetings, in 1976 between the USCC or the NCCB and any candidate for president of the United States.

b. The text of any public statements or press conferences issued or held by the USCC, the NCCB, or any members thereof with regard to such meetings with presidential candidates or the presidential election of 1976 generally.

c. The minutes of any meetings of the USCC or the NCCB at which the meetings, statements or conferences described in 8.a or 8.b were discussed.

9. Documents relating to or identifying the names and present whereabouts of each director or president and executive secretary of each state Catholic conference, and the bishop or archbishop and director of pro-life activities or the human life coordinators, for the following states, dioceses or archdioceses from 1974 to the present:

<i>States</i>	<i>Dioceses or Archdioceses</i>
California	Arlington, Va.
Florida	Baltimore, Md.
Iowa	Brooklyn, N.Y.
Maryland	Fargo, N. Dakota
Massachusetts	Harrisburg, Pa.
Michigan	New York, N.Y.
Minnesota	Pittsburgh, Pa.
Missouri	Philadelphia, Pa.
New Jersey	Richmond, Va.
New York	Rockville Center, N.Y.
North Dakota	St. Paul, Minn.
Pennsylvania	St. Cloud, Minn.
South Dakota	San Diego, Calif.
Texas	San Antonio, Texas
Virginia	St. Louis, Mo.
Wisconsin	Sioux Falls, S. Dakota
	Washington, D.C.
	Worcester, Mass.

10. Documents which reflect any financial support by the USCC, the NCCB, or any state Catholic conference, archdiocese, diocese, or parish church, for, or involvement of any church personnel (that is, persons who are members of or employed by the NCCB, USCC or any state Catholic conference, archdiocese, diocese or parish church) in, the activities of the following organizations:

National Committee for a Human Life Amendment
 Life Amendment Political Action Committee
 National Right to Life Committee
 National Right to Life Political Action Committee
 New York State Right to Life Committee
 Minnesota Citizens Concerned for Life
 Missouri Citizens for Life
 Missouri Citizens for Life Political Action Committee
 Celebrate Life Committee (Commack, N.Y.)
 Iowa Pro-Life Action Council
 Committee of Ten Million
 Virginia Society for Human Life

11. Documents reflecting any communications between the USCC, the NCCB, any member of the NCCB or any state Catholic conference, archdiocese, diocese, or parish church, investigation, and the Internal Revenue Service concerning any inquiry, request for information, request for a ruling, of or concerning any alleged or purported political activity or any act alleged or purported to be evidence of support for or opposition to candidates for public office or political party position.

12. Communications, memoranda, directives, letters or any similar documents (other than privileged attorney-client communications) circulated within the USCC or the NCCB or among or between the USCC, the NCCB, or any member or employee of the NCCB or USCC, and any state Catholic conference, diocese, archdiocese or parish church, concerning or monitoring the meaning and effect of, and compliance or lack of compliance with,

the provisions of § 501(c)(3) of the Internal Revenue Code with respect to political activity, or support for or opposition to candidates for political office.

13. Documents relating to any tax or information returns filed by the USCC or NCCB with the Internal Revenue Service.

14. Documents relating to any application filed by or on behalf of the USCC or the NCCB, or any predecessor organization thereof, with the Internal Revenue Service or other federal government agency for tax-exempt status under § 501(c)(3) of the Internal Revenue Code, without regard to the date on which any such application was filed, including, without limitation, all correspondence, memoranda or other communications relating to the consideration or approval by the Internal Revenue Service of any such application.

15. Documents between the USCC or the NCCB or any member or employee thereof and any of the organizations listed in paragraph 10 of this Schedule A relating to (a) the implementation of Part IV of the Pastoral Plan; or (b) the support of or opposition to candidates for public office or political party position.

16. Documents between the USCC or the NCCB or any member or employee thereof and any person who was, at the time such document was sent, an announced candidate for public office.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

NOTICE OF DEPOSITION

Please take notice that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs will take the deposition upon oral examination of the National Conference of Catholic Bishops, whose address is 1312 Massachusetts Avenue, N.W., Washington, D.C., by its custodian of records, before a notary public or other person authorized to administer oaths, at 2:00 p.m. on March 21, 1983, at the Office of the United States Attorney for the District of Columbia, Room 2125, United States Courthouse, 3rd and Constitution Avenue, N.W., Washington, D.C. The deposition will continue from day to day until completed.

Please take further notice that the deponent will be served with a subpoena pursuant to which he will be asked to produce at the deposition the documents identified in the annexed Schedule A.

You are invited to attend and cross-examine.

Dated: New York, New York
February 28, 1983

Yours, etc.

KARPATKIN POLLET PERLMUTTER
& BEIL

By: /s/ Marshall Beil
MARSHALL BEIL
Attorneys for Plaintiffs
708 Third Avenue
New York, New York 10017
Tel. (212) 557-4700

TO: William J. Brennan Esq.
Assistant United States Attorney
Attorney for Defendants
One St. Andrews Plaza
New York, New York 10007
Tel. (212) 791-1049

(Schedule A, which is identical to the Schedule appearing at pages 69-73 of the Joint Appendix, omitted in printing.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action File No. 80 Civ. 5590

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Plaintiffs
vs.

DONALD T. REGAN, Secretary of the Treasury, *et ano.*,
Defendants,

TO United States Catholic Conference, by its Custodian
of Records

1312 Massachusetts Avenue, N.W., Washington, D.C.

YOU ARE COMMANDED to appear at the Office of
the United States Attorney, the District of Columbia,
Room 2125,** in the city of Washington, D.C., on the
21st day March, 1983, at 10:00 o'clock A.M. to testify on
behalf of the plaintiffs at the taking of a deposition in the
above entitled action pending in the United States Dis-
trict Court for the Southern District of New York and
bring with you

The documents described in the annexed Schedule A.

Dated Feb. 28, 1983

Mar. 2, 1983

Karpatkin Pollet
Perlmutter & Beil
Attorney for Plaintiffs
708 Third Avenue, New York, N.Y. 10017

Clerk

By /s/ Oliver V. Jackson, Jr.
Deputy Clerk

** U.S. Courthouse, 3rd & Constitution Avenue

Any subpoenaed organization not a party to this suit is
hereby admonished pursuant to Rule 30(6), Federal
Rules of Civil Procedure, to file a designation with the
court specifying one or more officers, directors, or man-
aging agents, or other persons who consent to testify on
its behalf, and shall set forth, for each person designated,
the matters on which he will testify or produce documents
or things. The persons so designated shall testify as to
matters known or reasonably available to organization.

* * * *

RETURN ON SERVICE

Received this subpoena at 839 17th St., N.W., Wash.,
D.C. on E.B. Williams served it on the within named
E.B. Williams, Managing Partner; Williams & Connally
by delivering a copy to him and tendering to him the fee
for one day's attendance and the miles allowed by law.¹

By /s/ David de Clue
DAVID DE CLUE

Dated: March 2, 1983

Service Fees

Travel	
Services	\$15.00
Total	\$15.00

Subscribed and sworn to before me, a Notary Public
this 2nd day of March, 1985.

/s/ _____

(Schedule A, which is identical to the Schedule appear-
ing at pages 69-73 of this Joint Appendix, omitted in
printing.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action File No. 80 Civ. 5590

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Plaintiffs
vs.

DONALD T. REGAN, Secretary of the Treasury, *et ano.*,
Defendants,

TO National Conference of Catholic Bishops, by its Custodian of Records

1312 Massachusetts Avenue, N.W., Washington, D.C.

YOU ARE COMMANDED to appear at the Office of the United States Attorney, the District of Columbia, Room 2125,** in the city of Washington, D.C., on the 21st day March, 1983, at 2:00 o'clock P.M. to testify on behalf of the plaintiffs at the taking of a deposition in the above entitled action pending in the United States District Court for the Southern District of New York and bring with you

The documents described in the annexed Schedule A.

Dated Feb. 28, 1983

Mar. 2, 1983

Karpatkin Pollet
Perlmutter & Beil
Attorney for Plaintiffs
708 Third Avenue, New York, N.Y. 10017

Clerk

By /s/ Oliver V. Jackson, Jr.
Deputy Clerk

** U.S. Courthouse, 3rd & Constitution Avenue

Any subpoenaed organization not a party to this suit is hereby admonished pursuant to Rule 30(b)(6), Federal Rules of Civil Procedure, to file a designation with the court specifying one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which he will testify or produce documents or things. The persons so designated shall testify as to matters known or reasonably available to organization.

* * * *

RETURN ON SERVICE

Received this subpoena at 839 17th St., N.W., Wash., D.C. on E.B. Williams served it on the within named E.B. Williams, Managing Partner; Williams & Connally by delivering a copy to him and tendering to him the fee for one day's attendance and the mileage allowed by law.¹

By /s/ David de Clue
DAVID DE CLUE

Dated: March 2, 1983

Service Fees

Travel
Services	\$15.00
Total	\$15.00

Subscribed and sworn to before me, a Notary Public this 2nd day of March, 1983.

/s/ _____

(Schedule A, which is identical to the Schedule appearing at pages 69-73 of this Joint Appendix, omitted in printing.)

Abortion Rights Mobilization, Inc., et al. against Donald T. Regan, Secretary of the Treasury; Roscoe L. Eggers, Jr., Commissioner of Internal Revenue, et al.

80 Civ. 5590 (RLC)

ENDORSEMENT

The motion to quash plaintiffs' subpoenas is summarily denied. I have doubts that if the requested stay is granted, an analysis of the pertinent issues in this case will be produced in *Wright v. Regan* that will benefit the parties. The facts do not appear close enough to those here for that decision to be helpful. I, therefore, will not grant the stay. However, the parties may conserve their resources by agreeing on a schedule of discovery that provides for the least costly discovery activities over the next several months. By that time, the Supreme Court may have spoken and the impact of *Wright v. Regan* on the remainder of the discovery can be assessed.

If the parties have difficulty in concretizing this suggestion, you are invited to arrange for a conference with the court through my deputy clerk and perhaps the court can be of assistance.

IT IS SO ORDERED.

Dated: New York, New York
April 3, 1984

/s/ Robert L. Carter
ROBERT L. CARTER
U.S.D.J.

[Filed Apr. 4, 1984]

Abortion Rights Mobilization, Inc., et al. —against— James A. Baker, III, Secretary of the Treasury and Roscoe L. Egger, Jr., Commissioner of Internal Revenue

80 Civ. 5590 (RLC)

ENDORSEMENT

Plaintiffs move that the court find the United States Catholic Conference ("USCC") and the National Conference of Catholic Bishops ("NCCB") in contempt for failure to comply with a subpoena to produce various documents and a court order mandating compliance.

The subpoena seeks production of a variety of documents already in the public realm (e.g. Pastoral Plan, documents circulated in connection therewith, church bulletins, etc.). Respondents express concern about First Amendment infractions and seek delay in responding to the subpoena in the apparent hope and anticipation that an appellate court will reverse this court's substantive ruling in the case, thereby, removing the necessity for compliance to the subpoena by respondents. The problem is that although the government may succeed in reaching the appellate court on the merits, its prospects are not good. Respondents, therefore, have to face the reality that they must confront this issue on their own, without reliance of the government's efforts to overturn the court's ruling that the case go forward to trial.

The documents sought in paragraph 2 and paragraph 8c of the section of the subpoena entitled *Documents to Be Produced* are the only documents which could conceivably trench on First Amendment considerations. Those documents need not be produced at this time. Plaintiffs are ordered to narrow their request as to these items, and both sides are to present their views on whether required production of these items even as more narrowly and precisely defined by plaintiffs would violate

the constitutional protection afforded religious beliefs. The remainder of the requests are not in that category. There remains no justifiable excuse for refusal to abide by the court's order.

There is no claim that plaintiffs in serving the subpoena have failed to comply with Federal Rules of Civil Procedure or the local rules of this court. Plaintiffs have used the proper method for discovery vis-a-vis a non-party. See e.g. *In re Franklin National Bank Securities Litigation*, 574 F.2d 662, 668 (2d Cir. 1978). Accordingly, treating the USCC and NCCB filings as a motion to quash, the motion is denied. *Sony Corporation, et al. v. S.W.I. Trading, Inc.*, 104 F.P.D. 535, 542 (S.D.N.Y. 1985) (Edelstein, J.).

While I will not grant the motion to hold the USCC and the NCCB in contempt at this time, USCC and NCCB are ordered to comply with the subpoena forthwith. In the event there is a continued refusal or failure to obey the court's order, plaintiff may renew the motion.

IT IS SO ORDERED.

Dated: New York, New York
September 4, 1985

/s/ Robert L. Carter
ROBERT L. CARTER
U.S.D.J.

[Filed Sept. 5, 1985]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 5590 (RLC)

ABORTION RIGHTS MOBILIZATION, INC., et al.,
Plaintiffs,

—against—

JAMES A. BAKER, III, Secretary of the Treasury, and
ROSCOE L. EGGER, JR., Commissioner of Internal Revenue
Defendants.

[Filed Nov. 20, 1985]

ORDER

In light of (a) the action of the Second Circuit with regard to the defendants' petition for a writ of prohibition or mandamus and (b) plaintiffs' counsel's letter to the court assuring that plaintiffs shall refrain from extrajudicial use of materials heretofore obtained in discovery until the resolution of the issues discussed in ¶ 2, *infra*, plaintiffs' renewed motions for contempt and the letter applications of the United States Catholic Conference and National Conference of Catholic Bishops (USCC/NCBB) are resolved as follows:

1. No production by USCC/NCBB pursuant to plaintiffs' subpoena or this court's order issued on September 4, 1985, will be required pending the final disposition by the Second Circuit of the government's petition.

notwithstanding counsel for the parties and the USCC/NCBB shall confer and seek to agree whether and to what

extent any of the documents responsive to plaintiffs' subpoenas are to be subject to a confidentiality stipulation or order. If any issues remain unresolved by November 27, the USCC/NCBB shall promptly file a motion for a protective order with regard to the unresolved issues.

3. Except as provided herein, and subject to issues arising from the Second Circuit's decision on the government's petition, no further objections to plaintiffs' subpoenas, as limited by this Court's order of September 4, 1985, shall be entertained.

4. Plaintiffs' renewed motion for contempt is denied, without prejudice.

IT IS SO ORDERED.

Dated: New York, New York
November 19, 1985

/s/ Robert L. Carter
ROBERT L. CARTER
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

STIPULATION ENDORSING PROTECTIVE ORDER

WHEREAS, the National Conference of Catholic Bishops ("NCCB") and United States Catholic Conference ("USCC") have been requested to provide by production of documents information contended by them to be confidential, including information concerning non-public, financial, proprietary and other internal church documents;

WHEREAS, the plaintiffs will also seek to obtain such information through other forms of discovery such as depositions; and

WHEREAS, NCCB and USCC oppose the public disclosure or dissemination of any such confidential information and oppose the publication of any such confidential information by the electronic or print media;

IT IS HEREBY STIPULATED AND AGREED by and between plaintiffs, defendants, NCCB/USCC and their respective undersigned counsel that a Protective Order may be entered in the form attached hereto.

Respectfully submitted,

WILLIAMS & CONNOLLY

By: /s/ Charles H. Wilson
CHARLES H. WILSON
RICHARD S. HOFFMAN
839 17th Street, N.W.
Washington, D.C. 20006
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Attorneys for National Conference
of Catholic Bishops and United
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MARSHALL BEIL

/s/ Marshall Beil
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Attorney for Plaintiffs

RUDOLPH W. GIULIANI
United States Attorney

By: /s/ Gerald T. Ford
GERALD T. FORD
Assistant United States Attorney
One St. Andrews Plaza
New York, N.Y. 10007
(212) 791-1973
Attorney for Defendants

(Order Omitted in Printing)

Abortion Rights Mobilization, Inc., et al. against James A. Baker, III, Secretary of the Treasury, and Roscoe L. Egger, Jr., Commissioner of Internal Revenue

80 Civ. 5590 (RLC)

ENDORSEMENT

The renewed motion for contempt is denied without prejudice. While I agree that the USCC/NCCB are not in contempt since refusal was on advice of counsel, the likelihood of a rehearing being granted by the Court of Appeals on the January 14, 1986 denial of the petition is, based on the statistical evidence, so remote as to be practically nonexistent.

It is now the end of February. Unless the Court of Appeals grants the petition for rehearing in the interim, the USCC/NCCB are ordered on or before March 7, 1986, to produce the materials requested by plaintiffs in accordance with the court's order dated November 19, 1985. Failure or refusal of the USCC/NCCB to produce the materials requested will constitute grounds for a renewal plaintiffs' motion.

IT IS SO ORDERED.

Dated: New York, New York
February 26, 1986

/s/ Robert L. Carter
ROBERT L. CARTER
U.S.D.J.

[Filed Feb. 26, 1986]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 5590 (RLC)

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Plaintiffs,
—against—

JAMES A. BAKER, III, Secretary of the Treasury, and
ROSCOE L. EGGER, JR., Commissioner of Internal Revenue,
Defendants.

**NOTICE OF PLAINTIFFS'
RENEWED MOTION FOR CONTEMPT**

PLEASE TAKE NOTICE that upon the affidavit of Marshall Beil, sworn to March 18, 1986, the exhibits thereto, and the prior proceedings herein, the plaintiffs will renew their motion to this Court before the Honorable Robert L. Carter, District Judge, on March 31, 1986, at the United States Courthouse, Foley Square, New York, New York 10007, for an order (a) holding the United States Catholic Conference and the National Conference of Catholic Bishops in civil contempt for failure to comply with deposition subpoenas duces tecum served upon them on March 2, 1983 and with this Court's orders of February 26, 1986, November 19, 1985, September 4, 1985 and April 3, 1984, and (b) imposing sanctions upon the contemnors unless and until they comply in full, (c) for the costs, including reasonable attorneys fees, of this and plaintiffs' prior contempt motions, and (d) for such other and further relief as the Court may deem just and proper.

Dated: New York, New York
March 18, 1986

/s/ Marshall Beil
MARSHALL BEIL
19 West 44th Street
New York, New York 10036
(212) 575-8500
Attorney for Plaintiffs

TO: GERALD T. FORD, ESQ.
Assistant United States Attorney
One St. Andrews Plaza
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(212) 791-1973
Attorney for Defendants

CHARLES H. WILSON, ESQ.
WILLIAMS & CONNOLLY
839 Seventeenth Street, N.W.
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(202) 331-5067

and

HUGHES HUBBARD & REED
One Wall Street
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(212) 709-7000
Attorneys for United States Catholic
Conference and National Conference
of Catholic Bishops

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

**AFFIDAVIT IN SUPPORT OF
RENEWED MOTION FOR CONTEMPT**

MASHALL BEIL, being duly sworn, says:

1. I am an attorney for plaintiffs in this action. I submit this affidavit in support of plaintiffs' third renewed motion to hold the United States Catholic Conference and the National Conference of Catholic Bishops ("USCC/NCCB") in contempt for failing to produce documents in open defiance of two subpoenas and four orders of this Court.

2. For more than three years plaintiffs have attempted to obtain documents in the possession of the USCC/NCCB which are crucial to the resolution of this lawsuit.¹ Throughout this time the USCC/NCCB have stalled and delayed, filing motion after motion and raising objection after objection in order to prevent their document production and impede the orderly progress of this suit towards trial.

¹ Most of the documents subpoenaed from the USCC/NCCB are not obtainable elsewhere, except perhaps from other Catholic Church entities. To the extent that the defendants are successful with their argument that 26 U.S.C. § 6103 precludes production of documents by the IRS, the subpoenaed documents become even more essential to the preparation for and conduct of the trial of this action.

3. Finally, after three years of veiled hints and suggestions that the resolution of one more motion for a protective order or of one last attempt to appeal this Court's decisions upholding standing would mark the end of the USCC/NCCB's stalling tactics, the USCC/NCCB has shown their true colors and publicly announced that they will not abide by the mandate of this Court.

4. This Court cannot condone this unwavering three-year effort to take unfair advantage of the judicial process in order to delay this case unconscionably and prevent it from ever coming to trial. Civil contempt with substantial sanctions to insure compliance is both necessary and appropriate.

Chronology of Events

5. In early 1983, as attorney for the plaintiffs, I contacted counsel for the USCC/NCCB to see if voluntary production of certain documents would be possible. After an exchange of correspondence and phone calls I was informed the the USCC/NCCB would require formal subpoenas.

6. The subpoenas were promptly served. The requisite notices of deposition were served in this Court on February 28, 1983 and subpoenas duces tecum, issued by the District of Columbia District Court, were served on the USCC/NCCB on March 2, 1983. (Copies of the notices of deposition are attached as Exhibit A and the Subpoenas as Exhibit B to this affidavit.)

7. The USCC/NCCB responded by moving to quash on April 15, 1983. Several months later, the defendants moved for a stay of the decision of that motion while the Supreme Court decided the case later known as *Allen v. Wright*, 104 S.Ct. 3315 (1984).

8. On April 3, 1984, this Court denied both motions, in effect ordering compliance with the subpoenas. (The Court's decision is attached as Exhibit C.)

9. Thereafter, in accordance with that decision, I proposed to counsel for the USCC/NCCB to limit the categories of documents to be produced in the initial document production. The negotiations did not produce an agreement, although the USCC/NCCB "voluntarily" sent to me copies of several widely-circulated memoranda of their general counsel relating to the issues at bar.

10. The USCC/NCCB, however, refused to produce any additional documents—the vast bulk of material called for by the subpoenas and this Court's order—preferring, counsel informed me, to wait until *Allen v. Wright* was decided.

11. After the July 3, 1984 decision in *Allen v. Wright*, 104 S.Ct. 3315 (1984), the defendants renewed their motion to dismiss for lack of standing and the USCC/NCCB submitted an *amicus* brief in support of that motion. The motion was denied by this Court on February 27, 1985. *Abortion Rights Mobilization, Inc. v. Regan*, 603 F.Supp. 970 (S.D.N.Y. 1985).

12. Nonetheless, the USCC/NCCB continued to refuse to produce documents. In June 1986 the USCC/NCCB filed a motion for a protective order. The following month the Court held a pretrial conference to discuss the motions of plaintiffs and the USCC/NCCB. This conference and subsequent discussions among counsel failed to produce a single document. Plaintiffs filed for contempt.

13. Plaintiffs' initial contempt motion in July 1985 (the notice of motion and moving affidavit, without exhibits, are attached hereto as Exhibit D), resulted in this Court's order of September 4, 1985 which directed the USCC/NCCB to "comply with the subpoena forthwith." (That order is attached as Exhibit E.) In light of that direction, the Court denied plaintiffs' motion without prejudice, holding "[i]n the event that there is a

continued refusal or failure to obey the court's order, plaintiff[s] may renew the motion." (Exhibit E)

14. Despite the Court's explicit order, the USCC/NCCB continued to refuse to produce any documents at all. They stalled, waiting for the defendants to file a petition for a writ of mandamus or prohibition in the Second Circuit. When no documents were produced, plaintiffs renewed their motion for contempt in October 1985 (the notice of motion and moving affidavit, without exhibits, are attached hereto as Exhibit F).

15. On October 25, 1985 the Court held a pre-trial conference to discuss plaintiffs' motion and the USCC/NCCB request for yet another protective order, based on the pendency of the mandamus petition and other objections to production. At that conference, and in a subsequent order dated November 19, 1985 (attached as Exhibit G), the Court resolved the remaining objections to production and held that no further objections would be entertained. The Court agreed, however, to put off production pending the "final disposition" of the defendants' petition to the Second Circuit.²

16. The Second Circuit unanimously denied the government's petition for mandamus on January 14, 1986 without opinion. (The order is attached as Exhibit H.)

17. Nonetheless, the USCC/NCCB continued to refuse to produce any documents, and plaintiffs brought a second renewed motion for contempt on February 6, 1986. (The notice of motion and moving affidavit, without exhibits, are attached as Exhibit I.) In response, the USCC/NCCB urged the Court to wait until a decision by the Second Circuit on defendants' petition for rehearing.

² The one objection not resolved at the October 1985 pre-trial conference—the purported confidentiality of certain USCC/NCCB documents—was eliminated by the entry in January 1986 of a protective order agreed to by plaintiffs, defendants and the USCC/NCCB.

18. Once again this Court gave the USCC/NCCB another chance to comply. On February 26, 1986 this Court denied plaintiffs' motion without prejudice and ordered the USCC/NCCB to provide plaintiffs with requested documents on or before March 7, 1986, unless in the interim the Court of Appeals granted the rehearing petition. (That order is attached as Exhibit J.)

19. On March 3, 1986 the Court of Appeals denied defendants' petition for a rehearing and rehearing *en banc*, again unanimously and without opinion. (The order is attached as Exhibit K.)

20. The USCC/NCCB, having finally exhausted both the Court's patience and all possible dilatory tactics, dropped their facade and publicly announced their intention to defy the orders of this Court. On March 6, 1986, their attorney Charles H. Wilson, Esq., informed this Court by letter that the USCC/NCCB will not produce the subpoenaed and ordered documents. Rather, Mr. Wilson indicated his clients want to bring this case again before the second Circuit—for the second, nay, third, time this year.³

21. Thus, as even the USCC/NCCB recognize, they are in contempt of this Court.

22. Indeed, the USCC/NCCB have truly been in contempt of this Court's process and its time and energies and crowded docket from the moment they refused to comply with the April 1984 order of this Court (Ex. C). Had the USCC/NCCB been serious about wanting to force appellate review of the jurisdictional issues—rather than simply wanting to delay the ultimate resolution of this case—they could have invited contempt in

³ Counsel's letter is attached as Exhibit L. It seems to have been released to the press almost as soon as it was delivered to the Court and mailed to counsel. (See the press clippings attached as Exhibit M.)

April, 1984, or at any time thereafter. An appeal by the USCC/NCCB would have been particularly appropriate at the time the defendants submitted their mandamus petition. (In fact, the USCC/NCCB submitted an *amicus* brief to the Second Circuit in support of the petition arguing only the standing and other jurisdictional issues.)

23. To have done so would not have served the USCC/NCCB's purpose, however, as it would have brought on appellate review much earlier in these proceedings. Delay—not the expedition resolution of a legal dispute—has been the motivating factor behind the USCC/NCCB's three-year stall.

24. Accordingly, plaintiffs respectfully renew their motion for contempt and request that the Court impose immediate sanctions upon the USCC/NCCB unless and until they comply with the outstanding subpoenas and order the USCC/NCCB to pay for the costs, including reasonable attorneys fees, of these contempt motions.

/s/ Marshall Beil
MARSHALL BEIL

Sworn to before me this 18th day of March, 1986

/s/ Frank R. Curtis
Notary Public

(Exhibits Omitted in Printing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

DISTRICT OF COLUMBIA) ss:
)
)

AFFIDAVIT OF CHARLES H. WILSON

CHARLES H. WILSON, being duly sworn, deposes and says:

1. My firm, Williams & Connolly, has represented the United States Catholic Conference ("USCC") and the National Conference of Catholic Bishops ("NCCB") in this matter since shortly before the plaintiffs issued the subpoenas that are the source of the current controversy. I have been the attorney at Williams & Connolly principally responsible for representing USCC/NCCB in this matter.

2. USCC/NCCB's involvement in this case predated the subpoenas served on them by the plaintiffs. As the Court is aware, USCC/NCCB were named as defendants in the amended complaint filed by the plaintiffs. USCC/NCCB, along with the defendants, responded to the amended complaint by filing motions to dismiss that argued a variety of jurisdictional grounds on which the amended complaint was defective. The principal ground for the motions to dismiss was that the plaintiffs lacked standing to maintain the action and that the Court, therefore, lacked jurisdiction over the case.

3. With one exception, the Court denied the motions to dismiss filed by USCC/NCCB and the defendants. The one exception was to grant that aspect of USCC/NCCB's motion to dismiss them as defendants because no relief could be granted against them. However, the Court ruled that some of the plaintiffs did have standing to maintain the action and permitted those plaintiffs to proceed to adjudication on the merits of their amended complaint. *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982).

4. The case and the parties were in that posture when I was asked to undertake the representation of USCC/NCCB. The plaintiffs then served on USCC/NCCB the subpoenas that are the current source of contention. At that time, this Court had already denied the defendants' motion to certify an interlocutory appeal under 28 U.S.C. § 1292(b) of this Court's standing ruling. See *Abortion Rights Mobilization, Inc. v. Regan*, 552 F. Supp. 364 (S.D.N.Y. 1982).

5. After plaintiffs served their subpoenas, USCC/NCCB filed a motion to quash based on two jurisdictional deficiencies that had not been addressed in the Court's prior decision. USCC/NCCB were aware at the time that only if they were willing to risk the drastic sanction of contempt could they obtain appellate review of the jurisdictional issues presented by the motions to quash.

6. I advised USCC/NCCB that my analysis of the Court's decision denying the motions to dismiss and my research on the jurisdictional grounds on which a motion to quash could be based convinced me that this Court's standing ruling was in error and would probably be overturned on appeal. As part of my initial consultations with USCC/NCCB, I communicated that conclusion to my clients.

7. Consequently, from the very beginning of my representation of USCC/NCCB, my clients were guided by my

judgment of the importance of obtaining appellate review of the standing ruling before they had to submit to the plaintiffs' subpoenas.

8. USCC/NCCB's initial response to the subpoenas served by the plaintiffs was to move to quash those subpoenas. The motion to quash was based principally on arguments that the Court lacked jurisdiction over the case because its ruling on the motion to dismiss left the plaintiffs without a remedy and that they were without standing to maintain the action. The motion also expressed USCC/NCCB's concerns over the First Amendment implications of the searching inquiry manifested by the subpoenas and the burden in time and expense that the subpoenas would impose.

9. When the Court denied the motion to quash on April 3, 1984, it did so after the defendants had moved to stay all proceedings in the case, including the ruling on the motion to quash, pending the Supreme Court's disposition of the case of *Wright v. Regan* (decided and reported as *Allen v. Wright*, 104 S. Ct. 3315 (1984)). Defendants had argued that decision might cause the Court to reconsider its ruling on the standing issue in this case. While the Court denied the motion to quash and the request for a stay, it suggested that the parties avoid costly discovery activities until the Supreme Court acted. See Endorsement of April 3, 1984, attached to this Affidavit as Exhibit 1.

10. I had subsequent discussions with plaintiffs' counsel about document production. Thereafter, the General Counsel of USCC directed me to provide plaintiffs' counsel with several memoranda issued by the General Counsel advising Catholic bishops and other church entities on their obligations to refrain from political activity proscribed by 26 U.S.C. § 501(c)(3). (Copies of those memoranda are attached to this Affidavit as Exhibits 2-5.) My cover letter to plaintiffs' counsel cautioned against treating the receipt of those documents as the start of

document production. See Exhibit 6 to this Affidavit. Plaintiffs' attorney eventually acquiesced in my contention that USCC/NCCB should not be put to the burden of document production until the impact on this case of the Supreme Court's eventual decision in the *Wright* case could be assessed.

11. After the Supreme Court decided the case of *Allen v. Wright*, *supra*, on July 3, 1984, the defendants filed with this Court a renewed motion to dismiss the complaint, contending that this Court's standing ruling was at odds and in conflict with the Supreme Court's decision in *Allen v. Wright*. While that renewed motion was pending before this Court, plaintiffs made no serious demands on USCC/NCCB for document production.

12. After the Court denied the defendants' renewed motion to dismiss the complaint, plaintiffs made their first formal effort to compel compliance with the subpoenas by filing their first motion for contempt on June 18, 1985. At the time that the plaintiffs filed that motion, the Court had before it a motion by the defendants under 28 U.S.C. § 1292(b) requesting permission to take an interlocutory appeal of the denial of the renewed motion to dismiss. That motion stated the defendants' intention to seek relief through a writ of mandamus in the Court of Appeals if the § 1292(b) motion was denied.

13. After the Court denied the defendants' renewed motion to dismiss and before the plaintiffs filed their motion for contempt, I had several conversations with the attorney for the plaintiffs, who insisted that USCC/NCCB begin producing documents called for by the subpoenas. That demand caused me to consult further with representatives of USCC/NCCB.

14. Because of USCC/NCCB's long-standing concern about appellate review of the standing question and because the defendants were then actively pursuing attempts to obtain such review, I urged the plaintiffs' at-

torney to defer any contempt motion until after those efforts at appellate review had been exhausted. As I noted in my affidavit of July 2, 1985, plaintiffs' attorney declined to delay seeking contempt. (A copy of my affidavit of July 2, 1985, is attached to this Affidavit as Exhibit 7.)

15. At the time that the plaintiffs filed their motion for contempt, I advised representatives of USCC/NCCB that they could obtain appellate review of the Court's standing ruling independently of the defendants' efforts if they were found in contempt and appealed from that finding. USCC/NCCB rejected risking contempt at that time because the government was pursuing efforts to obtain appellate review. USCC/NCCB wished to avoid, if at all possible, any appearance of disrespect for this Court or of defiance of its orders.

16. After a hearing, the Court entered an Endorsement on September 4, 1985, denying the motion for contempt but ordering USCC/NCCB to comply with the subpoenas "forthwith." That Endorsement, attached to this Affidavit as Exhibit 8, permitted the plaintiffs to renew their motion if USCC/NCCB continued to refuse to comply with the subpoenas.

17. As recited in the plaintiffs' attorney's affidavit of October 9, 1985 (Exhibit F to the Affidavit of Marshall Beil dated March 18, 1986), I had discussions with plaintiffs' attorney following the Endorsement of September 4, 1985. By that time, it had come to the attention of USCC/NCCB that the lead plaintiff, Abortion Rights Mobilization, Inc., had used information obtained from the subpoena issued to the Roman Catholic Archdiocese of San Antonio, Texas, as the basis for a news release. (A copy of that news release is attached to this Affidavit as Exhibit 9.) During the discussions with plaintiffs' attorney, I stressed USCC/NCCB's concern over that use of whatever information plaintiffs might obtain through their subpoenas and asked for agreement on a confidentiality order. When plaintiffs refused to agree to such a confidentiality order, I informed their attorney by letter

that, absent such an order, USCC/NCCB could not consider further the issue of document production. (A copy of my letter to Marshall Beil of October 4, 1985, is attached to this Affidavit as Exhibit 10.) My intention in communicating that position of USCC/NCCB to plaintiffs' attorney was to seek the Court's assistance in obtaining a confidentiality order. In fact, after plaintiffs filed their renewed motion for contempt on October 9, 1985, I wrote to the Court requesting an informal conference pursuant to Rule 3(1) of this Court for that very purpose. (A copy of my letter to the Court of October 11, 1985, is attached to this Affidavit as Exhibit 11.)

18. At the time that the plaintiffs' attorney and I were discussing the issue of subpoena compliance, defendants filed a mandamus petition in the Court of Appeals to obtain review of the denial of their renewed motion to dismiss.

19. Indeed, by the time the Court convened an informal conference on October 25, 1985, as requested in my letter of October 11, 1985, the Court of Appeals had called for a response to the defendants' petition for a writ of mandamus. As a result of that action by the Court of Appeals, the Court entered an Order on November 19, 1985 (a copy of that Order is attached to this Affidavit as Exhibit 12), denying the renewed motion for contempt and relieving USCC/NCCB from any obligation to comply with plaintiffs' subpoenas until final disposition by the Court of Appeals of the government's petition for mandamus. That Order also acknowledged the legitimacy of USCC/NCCB's concern about confidential treatment of their documents and directed the parties to confer and agree to a stipulated confidentiality order.

20. The Court of Appeals denied the defendants' petition for mandamus in a summary order issued January

14, 1986, and plaintiffs renewed their motion for contempt on January 24, 1986. The Court of Appeals' action and the renewed motion for contempt caused me to engage in further discussions with representatives of USCC/NCCB concerning what action they should take with regard to the plaintiffs' subpoenas. While the Court denied the plaintiffs' second renewed motion for contempt in its Endorsement of February 26, 1986 (a copy of which is attached to this affidavit as Exhibit 13), it imposed a deadline of March 7, 1986, for USCC/NCCB to produce documents.

21. When the defendants' petition for rehearing the denial of its motion for mandamus was denied on March 3, 1986, it became apparent that all avenues of appellate review had been effectively foreclosed for the defendants. My discussions with representatives of USCC/NCCB in the period following the filing by plaintiffs of their second renewed motion for contempt focused on whether USCC/NCCB should submit to the subpoenas and allow plaintiffs to begin their broad and sweeping discovery against USCC/NCCB and related entities. Coming to a decision on that issue was not an easy process. It involved many hours of deliberation between myself and attorneys at USCC/NCCB, consultations between USCC attorneys and the appropriate staff people at USCC/NCCB, correspondence with the Executive Committee of USCC/NCCB, and, finally, deliberations by the members of the Executive Committee itself. The decision that was made, and made reluctantly, was to decline to comply with the subpoenas.

22. Because I was privy to most of the deliberative process that went into the ultimate decision made by USCC/NCCB, I can attest that that decision was made neither hastily nor lightly. USCC/NCCB had hoped throughout the period of its deliberations over submitting to the subpoenas that the defendants would be successful in obtaining appellate review and obviate any need to

risk contempt to obtain appellate review. When the defendants' efforts to obtain appellate review failed, USCC/NCCB finally concluded, as a matter of principle, that their only course of action was to risk a finding of contempt. They came to that conclusion because of their conviction on advice of counsel that this Court's standing ruling was in error and that, if that ruling is overturned on appeal, the Court will have no jurisdiction to order compliance with the highly intrusive and burdensome subpoenas that are at issue. That was the sole consideration taken into account by USCC/NCCB in its deliberations over subpoena compliance in reaching the ultimate decision that it made.

/s/ Charles H. Wilson
CHARLES H. WILSON

Subscribed and sworn to before me this 4th day of April, 1986.

/s/ [Illegible]
Notary Public

(Exhibits Omitted in Printing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

AFFIDAVIT OF WILFRED R. CARON

DISTRICT OF COLUMBIA)
) SS:
CITY OF WASHINGTON)

WILFRED R. CARON, being duly sworn, deposes and says:

1. I am General Counsel of the United States Catholic Conference and the National Conference of Catholic Bishops ("USCC/NCCB"). The statements made in this affidavit are on my personal knowledge, or upon information available to and relied upon by me for the performance of my duties. The purpose of my affidavit is primarily to explain how the plaintiffs' subpoenas impose such severe burdens on USCC/NCCB, in terms of resource diversion and intrusion, that USCC/NCCB believe they must decline compliance to obtain definitive appellate review of this Court's jurisdictional rulings. Plaintiffs' subpoenas seek to probe the decisional and policy making processes of USCC/NCCB and the implementation of the results of those processes.

2. This lawsuit targets the tax exemption for USCC/NCCB, and all other Catholic entities, institutions, or organizations whose tax exemption is embodied in a Group Ruling issued to USCC. The NCCB is an unincorporated association of all active Catholic bishops in the United States. It has legal status under Canon Law

(code of Canon Law, ccs 447-459) through which the bishops "jointly exercise certain pastoral functions." The USCC is a non-profit corporation organized under the laws of the District of Columbia with the same membership as the NCCB. The first Group Ruling was issued on March 25, 1946. One is issued annually covering organizations (unless otherwise noted) included in the current edition of the Official Catholic Directory (described *infra*, ¶ 4).

3. The current Group Ruling covers "agencies and instrumentalities and educational, charitable and religious institutions operated, supervised or controlled by or in connection with, the Roman Catholic Church in the United States, its territories or possessions appearing in the Official Catholic Directory for 1985." The Group Ruling is a procedural device which facilitates action by the Internal Revenue Service ("IRS"). The Group Ruling enables the IRS to act only on the application of USCC as the holder of the Ruling, and not on the initial application of each of the thousands of separate Catholic entities and institutions covered under the Ruling. Unless another Catholic organization could be found capable of holding a Group Ruling of this type, revocation of the USCC Group Ruling would require the Service to review and approve or disapprove the tax exempt status of each of the several thousand covered Catholic entities—dioceses (now 183), religious orders or institutes, and separately organized schools, hospitals, etc.

4. The Official Catholic Directory was first published in 1817 and is now published annually. The 1985 Official Catholic Directory contains 1,517 pages and is nearly two inches thick. We would be willing to make available a copy for inspection by the Court, and attach the listing for one diocese as an example of information found in the Directory (Exhibit 1). The Directory is a detailed listing of information on the bishops comprising the hierarchy of the Church in the United States, the structure of the USCC/NCCB, officers of State Catholic Confer-

ences, membership and facilities of religious orders, and the organization and composition of each diocese. For each diocese, it lists the names of the bishop of the diocese and all auxiliary bishops (if any), all diocesan officials, and every parish and priest, and contains separate lists for every Catholic institution within the diocese, namely, schools, colleges, seminaries, hospitals, homes for the aged or infirm, hospices, social service agencies, orphanages, counselling centers, youth centers, monasteries, convents, foundations, retreat houses, cemeteries, charitable groups, refugee assistance groups, etc. Each diocese is responsible for an annual revision of the entire listing for itself and each institution within the diocese, which is then published in the next year's edition of the Official Catholic Directory. The current Directory, and a list of changes, additions and deletions to the past year's Directory, is submitted to the Internal Revenue Service each year by USCC with a request for a Group Ruling. In this way, the Group Ruling is updated annually to reflect these changes in the Official Catholic Directory.

5. In order to understand more clearly the intrusive nature of the discovery that plaintiffs seek against NCCB/USCC, it is appropriate to consider how pro-life policy is made and implemented, specifically focusing on the Pastoral Plan for Pro-Life Activities, relied upon by plaintiffs for their legal theory. The USCC/NCCB policy on pro-life matters is formulated by the Ad Hoc Committee for Pro-Life Activities, chaired by Joseph Cardinal Bernardin, Archbishop of Chicago. His predecessors were Terence Cardinal Cooke and John Cardinal CODY. The membership currently includes twelve bishops and archbishops, one of whom is John Cardinal O'Connor, Archbishop of New York. This committee meets several times a year to review current developments and formulate policy related to abortion, such as the status and performance of various public education efforts, and to monitor public policy matters in legislation and litigation of concern to the Church.

The committee also considers other matters relevant to pro-life concerns, such as interfaith dialogue over medical care for handicapped infants, legislation affecting termination of artificial life sustaining treatment, etc.

6. Serving as staff to the Pro-Life Committee is the Office for Pro-Life Activities of the NCCB. That office is staffed by a priest-director, and two professional assistants, one responsible for monitoring legislative action (status of bills, drafting letters of comment, etc.) and the other for coordination of the NCCB Respect Life Program. The office supports the committee by monitoring developments in the pro-life area and serving as an information clearinghouse for dioceses and pro-life groups. Committee documents are invariably drafted by staff for committee review and approval. Committee decisions are implemented by the staff. In order for decisions to be fully executed, however, the staff must depend on the voluntary cooperation of the dioceses.

7. In November 1975 the bishops of the USCC/NCCB adopted the Pastoral Plan for Pro-Life Activities, an important pastoral effort to reverse the decline in "[r]espect for human life . . . in our society during the past decade." A copy is attached as Exhibit 2 to this affidavit. "In [the] Pastoral Plan, [the bishops] hope[d] to focus attention on the pervasive threat to human life arising from the present situation of permissive abortion." The Plan sought "to activate the pastoral resources of the Church in three major efforts: (1) an educational/public information effort . . . (2) a pastoral effort . . . [and] (3) a public policy effort" Under the general guidelines described in Paragraphs 5 and 6 for policy development, the document had been drafted by the staff and approved by the Pro-Life Committee prior to its adoption by the full membership of the USCC/NCCB. The Plan depends for its full execution on the cooperation of individual dioceses.

8. Plaintiffs labelled this Plan the "blueprint for the Church's illegal activities." Amended Complaint, ¶ 21. Quoting parts of the Plan out of context (*id.* ¶¶ 21-24, 30), plaintiffs cite various occurrences, which they term illegal political activity, as specific examples of the way the Pastoral Plan allegedly constituted a systematic violation of Section 501(c)(3) of the Internal Revenue Code (*id.* ¶¶ 25-28). Plaintiffs therefore seek documents embodying deliberations on and implementation of the Pastoral Plan adopted in 1975—every draft, every opinion letter, every summary of a meeting leading to the Plan and every letter, instruction, memorandum, or comment written about implementation of the Plan must be identified. ARM Subpoenas, ¶¶ 1-5. Every sermon, bulletin announcement, newspaper listing, meeting notice, etc. may be relevant if it deals with abortion. Plaintiffs also seek any document by any member of USCC/NCCB to or from any candidate for any public office (*Id.*, 16, see ¶¶ 6, 15). They seek documents on any financial or other support by any Catholic to twelve prolife organizations. (*Id.* ¶ 10). Plaintiffs seek USCC/NCCB-IRS correspondence and all documents concerning the interpretation and implementation of the tax code (Subpoenas ¶¶ 11, 12, 13, 14, 15). This sweeping effort would not only entail a significant burden (discussed *infra*, ¶¶ 15, 16), but, as discussed below, would address facts that are now largely of historical interest only.

9. The Pastoral Plan for Pro-Life Activities was extensively revised by the staff of the Pro-Life Office and the Pro-Life Committee in 1985. The revision was approved by the full membership of the USCC/NCCB in November 1985. A copy is appended as Exhibit 3. The Revised Plan reflects "the contemporary situation, but . . . reaffirms its central message regarding the dignity of human life while urging intensified efforts to implement this plan." It aims to change the current law on abortion, and "recognizes a need to remove or alleviate

those circumstances which may lead otherwise responsible people to choose such actions." The Plan emphasizes the Church's role in seeking to protect life as part of "a consistent strategy in support of human life in its various stages and circumstances." This strategy "links" issues "at the level of moral principle"—"abortion, nuclear war, capital punishment, degrading poverty, or racism, sexism and other forms of discrimination." This strategy rests on the premise that "a society which destroys human life by abortion under the mantle of law unavoidably undermines respect for life in all other contexts. Likewise, protection in law and practice of unborn human life will benefit all life, not only the lives of the unborn."

10. Of particular significance in assessing the intrusive burden of the subpoenas issued in 1983 is that the particular portions of the 1975 Plan cited by plaintiffs (amended complaint, ¶¶ 21-24, 30, 52) have been revised, eliminating much of what plaintiffs challenged. (1) Paragraph 22 of the amended complaint quotes portions of Exhibit 2 at pp. 2-3. The revised text is in Exhibit 3 at pp. 5-6. (2) Paragraph 23 of the amended complaint quotes text of Exhibit 2 found at p. 8. The revised text is in Exhibit 3 at p. 14. (3) Paragraph 24 of the amended complaint quotes parts of the text of Exhibit 2 at pp. 12-13. The revision deletes those portions; the text is now in Exhibit 3 at pp. 16-17.

11. The subpoenas also portend a potentially significant burden by identifying persons for possible deposition. Paragraph 9 of the subpoenas seeks, for each year from 1974 to the present, the identities of each president and executive secretary of the State Catholic Conferences in sixteen states and the bishops or archbishops and pro-life coordinators for eighteen dioceses.

12. Based on a review of the Official Catholic Directory for each year in question, the initial list of names

will consist of at least 160 persons. For the States listed, two (South Dakota and Virginia) have no Conferences. Because of personnel changes between 1974 and 1986, the other fourteen have had at least 55 persons in the positions of president or chairman and executive secretary, 25 of whom are bishops. With respect to the dioceses, there are now 18 bishops or archbishops of the dioceses and as many pro-life coordinators, for a total of 36 persons. There are also 47 auxiliary bishops (not counting predecessors not now serving in the named dioceses due to assignment changes). There have also been at least 21 persons who have served as prolife coordinators but are no longer functioning in that capacity in those dioceses. This list must be supplemented by the names of additional persons, including other bishops, who were already listed for depositions by plaintiffs in 1983.

13. Geographically, the persons who are potential witnesses reside in an area from Worcester, Massachusetts through the New York Metropolitan Area, south through Philadelphia, Baltimore, and Washington to Richmond, Virginia—in all, eleven dioceses in six states and the District of Columbia and five State conferences. Plaintiffs have also concentrated on the north-central part of the country, including the dioceses of Fargo, Sioux Falls, St. Cloud, St. Paul, and St. Louis and the Catholic Conferences in six adjoining states—Michigan, Wisconsin, Minnesota, North Dakota, Iowa, and Missouri. Plaintiffs will also examine Florida, Texas, and California, and the diocese of San Diego.

14. Plaintiffs have already begun discovery against the archdiocese of San Antonio. Plaintiffs served deposition subpoenas on Archbishop Flores, the Archdiocesan Publishing Society, and a former employee. The subpoenas sought documents concerning editorials and draft editorials from the archdiocesan newspaper, correspondence concerning the tax status of the archdiocese and its news-

paper, correspondence to or from any candidate, and documents concerning the 1975 Pastoral Plan. Both Church deponents resisted and moved to quash on the ground that this Court lacked jurisdiction over the case. That motion was denied and document production was commenced. Plaintiffs temporarily limited their discovery. Exhibit 4 hereto. Plaintiffs took no depositions and focused production mainly on documents about a single editorial in the archdiocesan newspaper. Plaintiffs, however, expressly stated their intention to seek complete discovery later. Exhibit 4.

15. Based on reasonable review of the subpoenas and of case developments, the USCC/NCCB and many Catholic dioceses and entities face the specter of several years' discovery. It is realistic to expect that the discovery process would divert Church resources away from pastoral and policy efforts in the pro-life area (noted above in ¶¶ 5, 6) to attend to the very detailed discovery planned by plaintiffs. For the time in which the limited staff of the Office for Pro-Life Activities is diverted to locate documents or be deposed, bishops are deposed (or preparing to be deposed), other files in state conferences and dioceses are sought and searched, more bishops and others are deposed, etc., these persons cannot perform their duties for the Catholic Church and its people.

16. ARM has sought and obtained this Court's approval for access, otherwise unavailable to them, to the deliberations, plans, and agenda of its Church opponents on a central and bitter area of disagreement—abortion. The plaintiffs now seek to probe the processes by which the policy makers of the Church applied Gospel values to draft the 1975 Pastoral Plan—its theme, its relation to the Church's religious mission, the means by which the Church chose to enter the public policy debate, etc. Everything thought, spoken, and written about the Plan is subject to discovery. This Court's protective order limits dissemination of this information but does not

limit plaintiffs' knowledge obtained through invasive discovery that might be used in this case or in the future controversies. Because of the highly intrusive character of this discovery effort, the USCC/NCCB must decline to comply with the subpoenas in an effort to gain definitive appellate review of this Court's jurisdictional rulings.

/s/ Wilfred R. Caron
WILFRED R. CARON

Subscribed and sworn to before me this 4th day of April, 1986.

/s/ _____
Notary Public

My Commission Expires September 30, 1987

(Exhibits Omitted in Printing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

REPLY AFFIDAVIT

MARSHALL BEIL, being duly sworn, says:

1. As attorney for plaintiffs I submit this affidavit in reply to the answering papers submitted by the United States Catholic Conference and the National Conference of Catholic Bishops ("USCC/NCCB") in response to plaintiff's third renewed motion for contempt.

2. The USCC/NCCB's answer leaves no doubt that they are in contempt of this court. The USCC/NCCB clearly and unequivocally refuse to comply with the Court's orders to produce the subpoenaed documents. For this reason alone, plaintiffs' motion should be granted.

3. The USCC/NCCB seek to justify their refusal, the three years of delay and the many earlier "missed" (or more accurately, "deliberately ignored") opportunities to obtain appellate relief, with repeated assertions of good faith and respect for the Court. As the Court has had many occasions over the past three years to observe the conduct and posturing of the USCC/NCCB first hand, no elaborate argument is necessary to point out that the lateness of the hour gives a particularly hollow ring to these protestations.

4. Most of the USCC/NCCB's papers are devoted to an attempt to paint a picture of the USCC/NCCB as an

institution under siege, a beleaguered, pastoral body through whose files the voracious plaintiffs seek to run amuck. The image does not ring true, however, as the reality is quite different.

5. The subpoenas, though necessarily broad given the nature of the parties and the subject matter, are carefully drawn to relate quite specifically to the issues at hand. The requests fall into three areas:

a) Documents relating to whether the USCC/NCCB or any their constituent elements in fact violated the anti-electioneering provision of § 501(c)(3), either in the passage and implementation of Part IV of the 1975 Pastoral Plan for Pro-Life Activities, which called for the establishment of congressional district committees to, among other things, "work for qualified candidates" committed to the Catholic Church's anti-abortion position (p. 13 of Ex. 2 to Caron affidavit), or in the Catholic Church's dealings with candidates for political office or specified "right-to-life" and other political groups;

b) Documents relating to the grant of tax-exempt status to the USCC/NCCB and to any efforts by the IRS to enforce the provision of the tax code at issue here;¹

c) Requests for specific relevant documents or the identity of persons with knowledge of relevant information.

¹ This portion of the plaintiffs' subpoenas virtually duplicates subpoenas served upon the USCC/NCCB by the defendants. (Defendants' notice of deposition of the NCCB which is identical to the subpoenas served by the government on the USCC and the NCCB is attached hereto as Exhibit N.) The original notice of motion by the USCC/NCCB to quash plaintiffs' subpoenas, dated April 15, 1983, also sought to quash defendants' subpoenas. Since the denial of that motion (Ex. C to Beil affidavit of March 18, 1986), the USCC/NCCB have neither objected further to defendants' subpoenas nor complied with them.

6. As even the USCC/NCCB implicitly recognize, this is perfectly proper discovery, appropriately tailored to the relevant factual and legal issues.

7. Rather, the USCC/NCCB suggest in their papers that the plaintiffs impermissibly "seek to probe the decisional and policy making processes" of the USCC/NCCB (Caron affidavit, par. 1). This assertion, however, ignores the prior rulings of this Court. The Court carefully reviewed similar arguments previously made by the USCC/NCCB and ruled that two subsections of the subpoenas seeking internal USCC/NCCB minutes would not be enforced until limited by agreement or further briefing. (Order of Sept. 4, 1985, Ex. E to Beil affidavit.) Such internal decisional processes, accordingly, are not part of the production now being sought.

8. The USCC/NCCB's repeated references to the newly revised Pastoral Plan for Pro-Life Activities are similarly of no help to them. That the USCC/NCCB have recently removed the portions of the Pastoral Plan most objected to by the plaintiffs does not make discovery concerning what happened in the ten years the 1975 Plan was in effect any less relevant. Indeed, isn't the 1985 revision of the Plan a confession of prior impropriety?

9. Finally, the history of plaintiffs' discovery from the Archdiocese of San Antonio does not conclusively demonstrate plaintiffs' voraciousness. Rather, it shows how discovery can be properly handled in this matter to avoid undue burden to a non-party witness.

10. After the Archdiocese's motion to quash was denied, along with the simultaneous USCC/NCCB motion (Ex. C), counsel for the Archdiocese, plaintiffs' Texas counsel and I worked out an arrangement which limited the Archdiocese's initial document production and postponed indefinitely the deposition of the Archbishop and others. Although plaintiffs have reserved their right to take this additional discovery, my hope is that by care-

ful use of stipulations and admissions, further discovery from the Archdiocese will not be necessary.²

12. I made a similar effort to limit initial production by the USCC/NCCB at about the same time. That effort was rebuffed totally, however, as the USCC/NCCB refused to comply at all. Now it is too late to negotiate.

13. Plaintiffs, whose resources are considerably more limited than those of the government or the Catholic Church, are painfully aware of the burdens of discovery and litigation. Throughout this case, plaintiffs have sought to eliminate expensive formalities and narrow the issues and areas of dispute wherever possible or practicable.³ Plaintiffs most certainly do not want this case to be any more protracted than it has already been.

14. By contrast, delay and increased burden on the plaintiffs work to the benefit of the USCC/NCCB which have been as responsible as any party for slowing down the forward progress of this action. The Court should not tolerate any further delay nor reward the USCC/

² The Archdiocesan production reveals the relevance of the materials sought in these subpoenas. The San Antonio Archdiocese produced documents which, among other things, confirmed that its official newspaper supported a presidential candidate in the Texas 1980 presidential primary—the article was entitled “To the IRS—‘Nuts!’” and is attached as Exhibit O; that the article and its tone of defiant challenge to the Internal Revenue Service received national publicity (see documents, one of which was produced by the Archdiocese, attached as Exhibit P); but that the IRS did absolutely nothing in response, never even contacting the Archdiocese or otherwise investigating the violation of the tax code. (see documents attached as Exhibit Q).

³ Defendants’ counsel and I have, for example, talked from time to time regarding limitations on the factual scope of discovery and trial. Because of the government’s efforts to appeal and the USCC/NCCB’s failure to produce documents, these discussions have not yet resulted in any concrete commitments. The effort to narrow the case will resume, however, immediately upon the resolution of the issues presented in this motion.

NCCB for their past inaction. Plaintiffs’ motion should be granted in all respects.

/s/ Marshall Beil
MARSHALL BEIL

Sworn to before me this 10th day of April 1986

/s/ Janice A. Ladusch
Notary Public

(Exhibits Omitted in Printing)

(1)
No. 87-416

Supreme Court, U.S.

E I L B D

JAN 23 1988

JOSEPH E. SPANOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE
and
NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Petitioners,
v.
ABORTION RIGHTS MOBILIZATION, INC., *et al.,*
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

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QUESTIONS PRESENTED

1. Whether in the absence of a case or controversy under Article III, a district court nevertheless has judicial power to issue a subpoena and compel compliance through civil contempt.

2. Whether opponents of the Roman Catholic Church's position on abortion have standing under Article III of the Constitution to challenge the tax-exempt status of the Catholic Church.

PARTIES TO THE PROCEEDING

Lawrence Lader, Margaret O. Strahl, M.D., Helen W. Edey, M.D., Ruth P. Smith, National Women's Health Network, Inc., Long Island National Organization for Women-Nassau, Inc., Rabbi Israel Margolies, Reverend Bea Blair, Rabbi Balfour Brickner, Reverend Robert Hare, Reverend Marvin G. Lutz, Women's Center for Reproductive Health, Jennie Rose Lifrieri, Eileen Walsh, Patricia Sullivan Luciano, Marcella Michalski, Chris Niebrzydowski, Judith A. Seibel, Karen DeCrow and Susan Sherer are also plaintiffs in the district court and respondents here. Secretary of the Treasury James A. Baker, III, and Commissioner of Internal Revenue Lawrence B. Gibbs are defendants in the district court and respondents here.*

* Pursuant to Rule 28.1, petitioner United States Catholic Conference states that it has no parent, affiliate or subsidiary corporations other than wholly-owned subsidiaries.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-416

UNITED STATES CATHOLIC CONFERENCE

and

NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Petitioners,
 v.

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States
 Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals is reported at 824 F.2d 156. The May 8, 1986 opinion of the district court holding petitioners in civil contempt is reported at 110 F.R.D. 337. The May 9, 1986 order of the district court amending its contempt citation is unreported. Earlier opinions of the district court denying the motions to dismiss are reported at 603 F. Supp. 970 and 544 F. Supp. 471.

JURISDICTION

The judgment of the court of appeals affirming the district court's contempt order was entered on June 4, 1987. A timely petition for rehearing, with suggestion for rehearing *en banc*, was denied on July 30, 1987. The petition for a writ of certiorari was filed on September 11, 1987, and granted on December 7, 1987. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2 of the Constitution provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

The plaintiffs in this case, Abortion Rights Mobilization, Inc. ("ARM") and others, seek a judicial order revoking the tax exemptions of approximately 30,000 Roman Catholic Church entities throughout the United States, on the purported ground that some or all of those entities have engaged in impermissible political activities. The affected Church entities, all of whom are covered by an annual group exemption letter, include not only the petitioners, the United States Catholic Conference and the National Conference of Catholic Bishops ("USCC/NCCB"), but also Catholic dioceses, parishes, elementary

and high schools, colleges, seminaries, hospitals, homes for the aged or infirm, orphanages, counseling centers, monasteries, retreat houses, refugee assistance groups and the like.¹

In pursuit of discovery on the merits, the plaintiffs served subpoenas *duces tecum* upon USCC/NCCB, distinct organizations with identical memberships consisting of all active Roman Catholic bishops in the United States. USCC/NCCB moved to quash the subpoenas on the ground, among others, that the plaintiffs lacked Article III standing to bring the suit and the court therefore lacked Article III power to issue or enforce the subpoenas. The district court denied the motion to quash and subsequently held USCC/NCCB in civil contempt. A divided panel of the Court of Appeals for the Second Circuit affirmed without deciding whether the plaintiffs had standing. The panel majority held that USCC/NCCB themselves were without "standing" to challenge the court's Article III power.

A. The Complaint

The amended complaint was filed on behalf of nine organizations and 20 individuals against the Secretary of the Treasury, the Commissioner of Internal Revenue, and USCC/NCCB. Three of the group plaintiffs are tax-exempt organizations that advocate the continuation of legalized abortion. The other six are health clinics that perform abortions. The individual plaintiffs are clergymen and voters who oppose the Roman Catholic Church's religious teaching on abortion. None of the plaintiffs al-

¹ The group ruling, which is issued to the USCC, covers all entities listed in *The Official Catholic Directory*, which now includes 185 dioceses, 19,546 parishes, 7,485 elementary schools, 1,408 high schools, 238 colleges, 645 hospitals, and numerous other Catholic entities. Joint Appendix 24-27. *The Official Catholic Directory* entry for the Diocese of Brooklyn appears in the Joint Appendix in the Court of Appeals, at A 464.

leges any IRS enforcement actions, or threatened enforcement actions, against them personally or against their churches. They claim only that the granting of a tax exemption to "the Roman Catholic Church" in general violates section 501(c)(3) of the Internal Revenue Code,² denies the plaintiffs due process and equal protection, and constitutes an establishment of religion.

The complaint alleges, "[u]pon information and belief, . . . [that] Roman Catholic priests and other Church officials have actively and systematically participated in political campaigns in all parts of the country" to advance their belief that unborn life is human and must be protected. Joint Appendix ("JA") 11. The complaint alleges further, once again "[u]pon information and belief," that "[m]any Catholic priests and other Church officials . . . have, from their pulpits, regularly and repeatedly urged their congregants to donate to 'right-to-life' committees and political parties, to obtain (often in the church parking lot following the service) 'right-to-life' campaign literature, to sign the nominating petitions of 'right-to-life' candidates. At least one church has distributed 'right-to-life' leaflets with the church bulletin." JA 12-13. Plaintiffs allege that a policy statement adopted by the NCCB in 1975, the Pastoral Plan for Pro-life Activities, is the "blueprint for the Church's illegal activities." JA 10-11.

The complaint seeks an injunction ordering the government to (1) "revok[e] the tax exemption of the Roman Catholic Church," (2) assess and collect all resulting

² At the time the amended complaint was filed, section 501(c)(3) exempted from federal income taxation those entities "organized and operated exclusively for religious, charitable, . . . or educational purposes, . . . which [do] not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." In 1987 Congress amended section 501(c)(3) to refer also to political campaign activities "in opposition to" any candidate for public office. Pub. L. 100-203 (1987).

back taxes, and (3) notify the Church's contributors that they may not claim charitable tax deductions for their contributions. JA 18-19.

B. The Motions To Dismiss

The government and USCC/NCCB moved to dismiss the complaint on several grounds, including lack of standing. On July 19, 1982, the district court granted the motions in part and denied them in part. Appendix to the Petition for a Writ of Certiorari. ("Pet. A.") 54a-92a. The court dismissed the claims against USCC/NCCB, but held that the plaintiffs (except five clinics) had standing to sue the government. The court found that the clergy plaintiffs had standing under the Establishment Clause, because they had "devoted their lives to religious communities and beliefs that are denigrated by government favoritism to a different theology." Pet. A. 67a-68a. The court found that all of the other individual plaintiffs and the three advocacy organizations had standing as voters. Pet. A. 69a-74a. The district court denied the government's motion to certify the question of standing for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). JA 2.

C. The Subpoenas

After USCC/NCCB had been dismissed as parties, ARM served subpoenas *duces tecum* on USCC/NCCB, demanding the production of voluminous internal Church documents relating to the Church's religious position on abortion and its communications with the IRS. The subpoenas demanded, among other things, the following documents: (1) all drafts of the Pastoral Plan for Pro-life Activities, a 1975 statement of the U.S. bishops' theological, moral and social position on abortion, JA 70, ¶ 1; (2) the minutes of the bishops' discussions of the Pastoral Plan's proposed contents, and all documents relating to its implementation, JA 70, ¶ 2; (3) all "Church Bulletins, clergy Bulletins, Pastoral letters, directives, memo-

randa, or similar documents issued or promulgated by any" bishop in the United States to any other person concerning the Pastoral Plan, JA 70, ¶ 6; (4) all documents reflecting contact with any candidates for public office anywhere in the United States, JA 71, ¶ 8; (5) all documents reflecting financial support or "involvement" of USCC/NCCB, "or any state Catholic conference, archdiocese, diocese, or parish church," or any "church personnel" (defined to include every employee of each of those organizations), with twelve national and state pro-life organizations, JA 72, ¶ 10; (6) USCC/NCCB's tax or information returns and, "without limitation, all correspondence, memoranda or other communications relating to the consideration or approval by the Internal Revenue Service" of any application for section 501(c)(3) status, JA 73, ¶ 14; and (7) the identities of the presidents and executive secretaries of the Catholic conferences in sixteen states, and the identities of the bishops and directors of pro-life activities in eighteen dioceses for the years 1975 to the present, J.A. 71, ¶ 9.³

USCC/NCCB moved to quash the subpoenas on the ground, *inter alia*, that the plaintiffs lacked Article III standing, and the court was therefore without Article III power to issue and enforce the subpoenas. One year later, on April 4, 1984, the district court "summarily denied" the motion in a single sentence. JA 80. At the same time, the court denied the government's motion to stay all proceedings in the case pending this Court's decision in *Allen v. Wright*, 468 U.S. 737 (1984). JA 80.

After *Allen* was decided, the government renewed its motion to dismiss the complaint for lack of standing.

³ The evident purpose of this last request—which would result in the identification of at least 25 bishops or archbishops, 47 auxiliary bishops and numerous others—was to identify witnesses to be deposed. JA 110. The plaintiffs have already indicated their intention to take the depositions of 17 individuals, 10 of whom are bishops or archbishops, and 3 of whom hold the rank of Cardinal. Court of Appeals Joint Appendix A 201.

The district court denied the motion on March 1, 1985, Pet. A. 93a-102a, and on July 15 denied the government's motion to certify the question of standing for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). JA 81.

D. Contempt Proceedings

On June 20, 1985, ARM moved to hold USCC/NCCB in contempt. USCC/NCCB moved for a protective order, arguing that the subpoenas raised substantial First Amendment issues that should not be faced while the government was attempting to secure appellate review. The court denied ARM's motion for contempt on September 5, but ordered USCC/NCCB to begin production of documents "forthwith."⁴ JA 81.

USCC/NCCB then asked ARM to agree to a protective order governing the use of the documents. ARM refused and filed a renewed motion for contempt. The district court directed the parties to enter into a protective order, denied plaintiffs' motion for contempt, and stayed compliance with the subpoenas pending the court of appeals' disposition of a petition for a writ of prohibition or mandamus that had been filed by the government. JA 83-84. The court of appeals summarily denied that petition on January 14, 1986. *In re Baker*, 788 F.2d 3 (2d Cir. 1986).

ARM once again renewed its motion to hold USCC/NCCB in contempt. On February 26, 1986, the district court denied the renewed motion, but ordered USCC/NCCB to begin production of documents on March 7, 1986. JA 87. On March 6, 1986, USCC/NCCB delivered to the district judge a letter explaining that they could not, in conscience, produce the subpoenaed records because of their belief that the court lacked jurisdiction to issue the subpoenas. Court of Appeals Joint Appendix

⁴ The district court ordered ARM to "narrow" two document requests relating to the minutes of bishops' meetings. Those documents were not required to be produced "at this time." JA 81-82.

A 369-71. ARM then renewed its motion to hold USCC and NCCB in contempt. JA 88. USCC/NCCB responded with affidavits detailing the reasons for their refusal to comply with the subpoenas. JA 96-112.

On May 8, 1986, the district court granted ARM's motion, held USCC/NCCB in civil contempt, and imposed a fine of \$50,000 per day against each organization for each day the documents were not produced. Pet. A. 44a-51a. The sanctions have been stayed throughout the course of the appellate proceedings. Pet. A. 52a-53a, 105a-107a, 108a-111a.

E. USCC/NCCB's Appeal

USCC/NCCB appealed from the civil contempt order on the ground that the district court lacked subject matter jurisdiction to entertain the suit or to issue and enforce its subpoenas. On June 4, 1987, a divided panel of the court of appeals affirmed. "A lack of subject matter jurisdiction," the majority announced, "does not disable the district court from exercising all judicial power." Pet. A. 12a. Relying principally on a 1919 grand jury case, *Blair v. United States*, 250 U.S. 273 (1919), the majority held that "[w]ith respect to jurisdiction over the underlying action . . . the witness may make only the limited challenge as to whether there exists a *colorable basis for exercising subject matter jurisdiction*, and not a full-scale challenge to the correctness of the District Court's exercise of such jurisdiction." Pet. A. 1a, 10a (emphasis added). In one paragraph, the court then found that "colorable jurisdiction" existed. Pet. A. 19a-20a.

Judge Cardamone dissented,⁵ emphasizing this Court's statement in *United States v. Morton Salt Co.*, 338 U.S.

⁵ Judge Kearse filed a brief concurring opinion, emphasizing that the court's jurisdiction to determine jurisdiction must include the ability to compel evidence designed to establish standing. Pet. A.

632, 642 (1950), that "[t]he judicial subpoena power . . . is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution." Pet. A. 24a. He concluded that "both traditional constitutional principles and case law make clear the District Court's power to issue discovery and civil contempt sanctions derives from and is limited by its power over the lawsuit." Pet. A. 27a. Consequently, he concluded that USCC/NCCB could challenge the lawfulness of the subpoenas based upon the absence of subject matter jurisdiction. Indeed, citing *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986), Judge Cardamone stressed that "[w]holly apart from the witnesses' standing, we have an independent and affirmative duty to review the lower court's authority." Pet. A. 30a.

SUMMARY OF ARGUMENT

The plaintiffs in this case lack Article III standing to challenge the tax-exempt status of the Roman Catholic Church. The district court was, therefore, without "judicial Power" under Article III to issue subpoenas seeking discovery on the merits, or to enforce those subpoenas through civil contempt.

I. The judicial subpoena power is an element of the "judicial Power" conferred by Article III. See, *e.g.*, *United States v. Morton Salt Co.*, 338 U.S. 632, 641-42 (1950). As such, it is limited by Article III's requirement of a case or controversy. If there is no case or controversy, there is no judicial power to issue a subpoena or to compel compliance through civil contempt. This Court has repeatedly held that "'orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt.'"

42a. But the discovery sought through these subpoenas relates only to the merits of the asserted claims, not to standing or any other aspect of jurisdiction.

United States v. United Mine Workers, 330 U.S. 258, 291 (1947), quoting *United States v. Shipp*, 203 U.S. 563, 573 (1906). Indeed, this Court has held that a civil contempt order cannot stand if for any reason the underlying order was “erroneously issued” or “beyond the jurisdiction of the court.” *United Mine Workers*, 330 U.S. at 295. That principle surely applies when, as in this case, the jurisdictional defect is the absence of Article III power.

The court of appeals’ conclusion that “colorable” jurisdiction is sufficient to justify the issuance of a subpoena and the imposition of civil contempt sanctions was based upon a misreading of *United Mine Workers*. Recognizing that courts necessarily have jurisdiction to decide their own jurisdiction, this Court in *United Mine Workers* held that criminal contempt may be imposed for violating orders entered “to preserve the existing conditions” pending a determination as to jurisdiction—as long as the claim of jurisdiction is “substantial” and “not frivolous.” *Id.* at 291, 293. But the subpoena in this case was not entered to facilitate a decision on jurisdiction, or to preserve existing conditions pending such a decision. In fact, the district court had already decided, erroneously, that it had jurisdiction.

The court of appeals itself recognized that if the lack of Article III power disables a court from issuing a subpoena, then the witness to whom a subpoena is addressed may challenge it on the ground that Article III power is lacking. Indeed, even if the witnesses in this case had not challenged the court’s Article III power to subpoena them and hold them in contempt, the district court and the appellate courts would have been required to raise the issue *sua sponte*. See, e.g., *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986).

II. That the district court was without judicial power under Article III is clear. In this case, as in *Allen v. Wright*, 468 U.S. 737 (1984), and *Simon v. Eastern*

Kentucky Welfare Rights Organization, 426 U.S. 26 (1976), the plaintiffs lack Article III standing to challenge the tax-exempt status of third parties, because they cannot establish that they suffered “distinct and palpable” “personal injury” that was “fairly traceable” to the grant of a tax exemption and “likely to be redressed by the requested relief.” *Allen*, 468 U.S. at 751. The claim of the clergymen that they have somehow been “denigrated” by the IRS’s failure to revoke the tax-exempt status of the Roman Catholic Church is insubstantial. The IRS has neither endorsed Catholicism nor stigmatized those who practice other religions. And even if the clergy plaintiffs can be said to have suffered some undefined stigma, that is constitutionally insufficient to support standing because they were not “personally denied equal treatment” or “‘directly affected by the laws and practices against which their complaints are directed.’” *Allen*, 468 U.S. at 755 (emphasis added); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 487 n.22 (1982), quoting *Abington School District v. Schempp*, 374 U.S. 203, 224 n.9 (1963) (emphasis added).

Nor is the plaintiffs’ claim of voter standing sufficient under Article III. Unlike the plaintiffs in *Baker v. Carr*, 369 U.S. 186 (1962), these plaintiffs do not allege any diminution in their representation or impairment of their right to vote. And it is entirely “speculative” whether revocation of the Catholic Church’s tax exemption “would have a significant impact” on the plaintiffs’ ability to accomplish their political objectives. *Allen*, 468 U.S. at 758.

In this case, as in *Valley Forge*, *Allen*, *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 228 (1974), and other cases, the plaintiffs “fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an

injury sufficient to confer standing under Art. III” *Valley Forge*, 454 U.S. at 485 (emphasis in original).

Finally, recognizing standing in this case would intrude the Judiciary into the enforcement prerogatives of the Executive Branch, in disregard of the constitutional separation of powers and the elaborate statutory framework established for enforcement of the tax code.

ARGUMENT

The plaintiffs in this case, a group of individuals and organizations who oppose the Roman Catholic Church’s position on abortion, challenge the tax-exempt status of the Roman Catholic Church in the United States. In pursuit of their purported claims, they seek massive discovery from the two national organizations of Catholic bishops. These efforts by legal bystanders to invoke the judicial power against the Catholic Church fly in the face of Article III of the Constitution and the precedents of this Court.

I. USCC/NCCB MAY CHALLENGE THE COURT’S ARTICLE III POWER

A. A Court Without Article III Power Cannot Issue A Subpoena Or Coerce Compliance Through Civil Contempt

In *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 475-76 (1982), this Court stated the fundamental principle that governs this case:

[O]f one thing we may be sure: Those who do not possess Article III standing may not litigate as suitors in the courts of the United States.

The absence of Article III standing not only disables plaintiffs from securing a judgment; it bars them from “litigat[ing] as suitors” in the federal courts. *Ibid.* That means, among other things, that they may not invoke the court’s process to compel testimony, and they may not seek civil contempt orders to assist them in litigation. The power to subpoena witnesses in a civil case,

and to hold them in civil contempt, is part of the “judicial Power” conferred by Article III, and that power extends only to cases and controversies.

The court of appeals majority rejected this basic principle of constitutional law. The majority explicitly “disagree[d]” with “the contention of the [USCC/NCCB] and the federal defendants that the lack of subject matter jurisdiction over the underlying lawsuit impairs the power of the district court to order the witnesses to produce evidence and to adjudicate them in contempt for their refusal.” Pet. A. 12a. The majority explained:

If the absence of subject matter jurisdiction over the underlying suit would preclude the District Court from ordering a witness to produce evidence and effecting compliance, then we would agree that the witness would have standing to assert such a claim on appeal from an adjudication of contempt. We disagree, however, with the premise. *Ibid.*

The majority held that the power to issue subpoenas and impose civil contempt penalties for noncompliance are virtually free of Article III limitations: only a “colorable” claim of jurisdiction is necessary to sustain the issuance of a subpoena and the imposition of civil contempt. Pet. A. 18a. That conclusion was erroneous. When a claim of jurisdiction is “colorable,” the court’s power to decide jurisdiction can support limited discovery *on the issue of jurisdiction*, as well as orders preserving existing conditions *pending* a decision on jurisdiction. But the court’s necessary power to decide jurisdiction cannot support discovery, like that involved here, relating solely to the merits. When, as in this case, it can be readily determined without the subpoenaed information that jurisdiction—indeed, Article III power—is lacking, that lack of power extends to the issuance of the subpoenas and the imposition of civil contempt for noncompliance.

1. *The Subpoena Power and Civil Contempt Power Are Subject to Article III*

In *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), this Court made clear that the judicial subpoena power is an element of the "judicial Power" conferred by Article III, and is therefore limited by the requirement of a case and controversy.

Federal judicial power itself extends only to adjudication of cases and controversies The judicial subpoena power not only is subject to specific constitutional limitations, . . . but also is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution.

Id. at 641-42. In short, absent a case or controversy, there is no judicial power to issue subpoenas.⁶ See also *United States v. Bisceglia*, 420 U.S. 141, 148 (1975); *United States v. Powell*, 379 U.S. 48, 57 (1964).

The power to issue civil contempt orders is likewise limited by Article III. If there is no judicial power under Article III to issue a subpoena, then there is no power to compel compliance through civil contempt. Civil contempt "is wholly remedial, [and] serves only the purposes of the complainant." *McCrone v. United States*, 307 U.S. 61, 64 (1939); see also *Penfield Co. v. SEC*,

⁶ The court of appeals read *Morton Salt* as addressing only "discovery directed at a party that is resisted on the ground that the court lacks subject matter jurisdiction over the lawsuit," not discovery directed at non-party witness. Pet. A. 17a (emphasis added). But *Morton Salt* addressed the "subpoena power," and subpoenas are ordinarily addressed to non-parties, not parties. Subpoenas are not necessary to secure discovery from parties. See Fed. R. Civ. P. 26-37. In any event, if, as the court of appeals majority conceded, the lack of Article III power disables a court from authorizing discovery from a party, it necessarily disables a court from subpoenaing a non-party. Article III sets limits on the judicial power, and that power is no greater over non-parties than over parties.

330 U.S. 585, 590 (1947); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911). Its purpose here was to assist the plaintiffs in pursuit of their claim for relief. If the plaintiffs are without Article III standing to sue, however, they have no claim to the court's assistance, and the court has no power to provide it.

Proceedings for civil contempt "are instituted and tried as a part of the main cause," *Gompers v. Bucks Stove & Range Co.*, 221 U.S. at 445, and if there is no judicial power over the main cause there is no power to issue a civil contempt order. As Judge Cardamone concluded in his dissent, the courts' "power to issue a civil contempt order derives from and depends upon their subject matter jurisdiction over the underlying action." Pet. A. 23a.

There is nothing novel or uncertain about the principle that contempt sanctions may not be imposed for violations of orders that are beyond the power or jurisdiction of the court. The principle was recognized by this Court in a series of decisions a century ago. In *Ex parte Rowland*, 104 U.S. 604, 612 (1882), the Court held that "if the command [of an order] was in whole or in part beyond the power of the Court, the writ, or so much of it as was in excess of jurisdiction, was void, and the Court had no right in law to punish for any contempt for its unauthorized requirements." In that case, county commissioners had been held in contempt for refusing to obey a federal court order directing them to collect a special property tax. The order, this Court concluded, "was beyond the jurisdiction of the Circuit Court," *id.* at 616, and since the underlying order "was in excess of jurisdiction, so necessarily were the proceedings for contempt in not obeying." *Id.* at 617-18.

Four years later, the Court repeated the point in *Ex parte Fisk*, 113 U.S. 713, 718 (1885):

When . . . a court of the United States undertakes, by its process of contempt, to punish a man for re-

fusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void.

Finding that the Circuit Court was "without authority" to enter orders for the pretrial examination of the defendants, the Court concluded that it was "equally without authority to enforce these orders by process for contempt." *Id.* at 726.⁷ See also *In re Burrus*, 136 U.S. 586, 597 (1890) (granting a writ of *habeas corpus* to individual held in contempt for violating a child custody order on the ground that the court had no jurisdiction over the case); *In re Sawyer*, 124 U.S. 200, 221 (1888) (granting a writ of *habeas corpus* to state officials held in contempt for disobeying a federal court order where the suit "relate[s] to a subject which the Circuit Court of the United States . . . has no jurisdiction or power over"); *Gompers v. Bucks Stove & Range Co.*, *supra* (reversing civil contempt judgment on ground that underlying dispute was settled).

In *United States v. United Mine Workers*, 330 U.S. 258 (1947), this Court reaffirmed the principle that a civil contempt order cannot stand if the court lacks jurisdiction or power over the underlying action, or if for any reason the order that is disobeyed was "erroneously issued" or "beyond the jurisdiction of the court." *Id.* at 295.⁸ In that case, a union and its president challenged

⁷ The jurisdictional determinations in these cases were not made on appeal from judgments on the merits, but rather in *habeas corpus* proceedings aimed at the contempt orders. The cases proceeded by writ of *habeas corpus* because, prior to this Court's decision in *Alexander v. United States*, 201 U.S. 117 (1906), contempt judgments were not separately appealable. See *Ex Parte Fisk*, 113 U.S. at 718.

⁸ This principle has been applied on countless occasions in the federal courts. See, e.g., *In re Sequoia Auto Brokers, Ltd.*, 827 F.2d 1281 (9th Cir. 1987); *Blocksom & Co. v. Marshall*, 582 F.2d 1122, 1124 (7th Cir. 1978); *ITT Community Development Corp. v.*

civil and criminal contempt orders entered for violation of a temporary restraining order against a strike. The temporary restraining order had been entered to preserve the *status quo* while the court considered the union's contention that the Norris-LaGuardia Act deprived the court of jurisdiction to issue an injunction against the strike.

This Court upheld the criminal and civil contempt orders on the ground that "the elements of federal jurisdiction [over the case] were clearly shown," *id.* at 294, and that the Norris-LaGuardia Act did not deprive the court of jurisdiction to issue a temporary restraining order. It concluded, however, that if the Norris-LaGuardia Act did place injunctive relief "beyond the jurisdiction of the District Court," *id.* at 289, the judgment of criminal contempt would be affirmed, while the judgment for civil contempt would be "set aside." *Id.* at 295.

The Court recognized, at the outset, the basic principle established by its earlier decisions: "'orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt.'" *Id.* at 291, quoting *United States v. Shipp*, 203 U.S. 563, 573 (1906). The district court, however, "'necessarily had jurisdiction to decide whether the case was properly before it,'" and "[u]ntil its judgment declining jurisdiction should be announced, it had authority from the necessity of the case to make orders to preserve the existing conditions.'" *Ibid.* Disobedience of such orders, the Court held, "is punishable as criminal contempt" even if it develops that jurisdiction was lacking—but not if "the question of jurisdiction [was] frivolous and not substantial. . . ." *Id.* at 293.

Civil contempt, which is involved here, was regarded as a different matter. "If the Norris-LaGuardia Act

Barton, 569 F.2d 1351, 1356 (5th Cir. 1978); *United States v. Thompson*, 319 F.2d 665 (2d Cir. 1963).

were applicable in this case," the Court concluded, "the conviction for civil contempt would be reversed in its entirety." *Id.* at 295. Civil contempt, as noted above, "is wholly remedial, [and] serves only the purposes of the complainant." *McCrone v. United States*, 307 U.S. at 64. And the complainant's "right to remedial relief falls with an injunction which events prove was *erroneously issued*, and *a fortiori* when the injunction or restraining order was *beyond the jurisdiction of the court*." *United Mine Workers*, 330 U.S. at 295 (emphasis added) (citations omitted).

United Mine Workers and *Morton Salt* together dictate the result in this case. *Morton Salt* makes clear that a court is without power to issue a subpoena absent a case or controversy, and *United Mine Workers* confirms the well-established principle that an order that is beyond the court's power or jurisdiction cannot sustain a judgment of civil contempt.⁹

2. A "Colorable" Claim of Article III Power is Insufficient to Support the Issuance of the Subpoenas and Civil Contempt Order in this Case

Citing *United Mine Workers*, the court of appeals majority concluded that a "colorable" claim of Article III power is always sufficient to support the issuance of a subpoena and the imposition of civil contempt for its disobedience. Pet. A. 18a. But neither *United Mine Workers* nor any other decision of this Court or any other court supports such a rule.

United Mine Workers simply recognized that when a non-frivolous claim of jurisdiction is made, the court necessarily has power to enter orders *necessary to enable*

⁹ While the principal jurisdictional defect in this case is the absence of Article III power, *United Mine Workers* makes clear that a civil contempt order cannot stand if there is any jurisdictional defect in the underlying order. The jurisdictional issue in that case was a statutory one.

it to decide the question of jurisdiction, and to enforce those orders through criminal contempt. 330 U.S. at 293. But when, as in this case, the underlying order is not entered to facilitate a decision on jurisdiction, but rather to secure discovery on the merits, merely "colorable" jurisdiction cannot support civil or criminal contempt. In these circumstances, the general rule prevails: "'orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt.'" *Id.* at 291, quoting *Shipp*, 203 U.S. at 573. See *In re Green*, 369 U.S. 689, 692 (1962) ("state court is without power to hold one in contempt for violating an injunction that the state court had no power to enter by reason of federal pre-emption").¹⁰

There is no claim in this case that the subpoenas and contempt order were intended to assist the court in resolving the question of jurisdiction, or to preserve the *status quo* pending that determination. In fact, the district court had already made a determination that it had jurisdiction. USCC/NCCB's decision not to comply with the subpoenas did not frustrate the court's ability to decide the question of jurisdiction; to the contrary, it was the only means available to them to seek review of the jurisdictional basis for the subpoenas. See *United States v. Ryan*, 402 U.S. 530, 532-33 (1971); *Cobbledick v. United States*, 309 U.S. 323 (1940). Nor would compliance with the subpoenas have preserved the *status quo*; compliance would have destroyed the existing con-

¹⁰ When this Court has upheld *criminal* contempt convictions without regard to the correctness of the underlying order, it has emphasized that the court below had personal jurisdiction and subject matter jurisdiction—not merely "colorable" jurisdiction. *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967); *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922). (*Howat* also upheld a civil contempt order—not, however, on the ground that the correctness of the underlying order was irrelevant, but rather on the ground that the particular constitutional challenge asserted did not affect the validity of the underlying order. 258 U.S. at 185-86.)

ditions by revealing the information USCC/NCCB sought to protect. See *Moness v. Meyers*, 419 U.S. 449, 460 (1975).

The suggestion that colorable jurisdiction is all that is necessary to sustain the subpoena and civil contempt powers in these circumstances is unsupported by case law or necessity. There are, in fact, compelling reasons to insist that the burdens of discovery and civil contempt not be imposed if the Constitution deprives the court of power to resolve the underlying dispute. The burdens and costs of discovery may be more significant from a practical standpoint than the actual outcome of the case—in particular when, as in this case, sensitive internal information is sought. In some cases, the desire to pursue discovery may be the reason for bringing a lawsuit in the first place. The burdens of civil contempt, as the \$100,000 daily fine in this case illustrates, can be even greater. The sensible rule—and the rule required by the Constitution—is that a court without Article III power to decide a matter is also without Article III power to issue and enforce subpoenas that can only be justified by the need to prepare the matter for decision on the merits.

B. USCC/NCCB Are Not Precluded From Challenging The Court's Article III Power

The court of appeals held that USCC/NCCB did not have what it called “standing” to challenge the district court's Article III power over the lawsuit. Pet. A. 8a, 12a, 15a. But that conclusion was premised upon its erroneous view that the absence of Article III power “does not disable” the court from issuing subpoenas and civil contempt orders. Pet. A. 12a. Even the court of appeals majority recognized that if Article III power is necessary to support a judicial subpoena, then USCC/NCCB do “have standing” to challenge the court's Article III power. Pet. A. 12a. There is, then, no real issue of USCC/NCCB's right to raise its jurisdictional defense.

1. “Standing” Is Not Necessary To Point Out the Court's Lack of Article III Power

Any suggestion that USCC/NCCB lack “standing” to challenge the court's Article III power reflects a misunderstanding of the requirements of Article III. The existence of “judicial Power” under Article III is not a matter to be considered only when raised by an interested party. Article III power is always at issue, as is subject matter jurisdiction generally, and must be considered whenever and by whomever it is raised—indeed, whether it is raised at all. Federal Rule of Civil Procedure 12(h) (3) makes that clear:

Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. (Emphasis added).

A federal court is obliged to examine its possible lack of subject matter jurisdiction whether the matter is raised by a party, by a witness, or by the court on its own initiative—and whether it is raised when the complaint is filed, in the course of discovery, in the midst of trial, or on appeal. Thus, in *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986), this Court vacated the judgment of the court of appeals on the ground, never asserted by any of the parties, that the appellant lacked Article III standing. The Court explained:

Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. For that reason, every federal appellate court has a special obligation to “satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,” even though the parties are prepared to concede it.

475 U.S. at 541, quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934) (citation omitted).

The question of jurisdiction is so "fundamental" that "the Court is bound to ask and answer [it] for itself, even when not otherwise suggested, and *without respect to the relation of the parties to it.*" *Bender*, 475 U.S. at 547, quoting *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884) (emphasis added).¹¹ See also *Hodel v. Irving*, 107 S.Ct. 2076, 2080 (1987) (raising, *sua sponte*, Article III and prudential limitations on standing); *Juidice v. Vail*, 430 U.S. 327, 331-33 (1977) (standing); *United States v. Corrick*, 298 U.S. 435, 440 (1936) (statutory jurisdiction). It necessarily follows that the court is bound to answer the question of jurisdiction when it is "suggested" by anyone, party or witness.

2. USCC/NCCB Have "Standing" To Point Out the Court's Lack of Article III Power

Even if some sort of "standing" were required to raise the district court's lack of Article III power, it certainly would not be lacking in this case. USCC/NCCB can show that they suffer "actual or threatened injury as a result of" the Court's exercise of purported Article III power against them, and that their injury is "redressable by the court." *Bender*, 475 U.S. at 542 (citations omitted).

¹¹ The court of appeals majority read *Bender* as requiring a reviewing court to consider jurisdiction over the underlying action only on an appeal from a final judgment in the underlying action. Pet. A. 16a. But that reading of *Bender* simply reflects the majority's erroneous view that the subpoena and civil contempt powers do not depend on the existence of Article III power over the underlying suit. See Pet. A. 12a. And since *Bender* makes clear that the obligation to consider jurisdiction "is inflexible and without exception," applying "in all cases" and "[o]n every writ of error or appeal," 475 U.S. at 547, quoting *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. at 382, the district court's Article III power must be examined on this appeal.

The judicial subpoena and civil contempt powers have been invoked to compel USCC/NCCB to produce voluminous internal church documents to outspoken critics of the Catholic Church. Noncompliance with the subpoenas has resulted in daily fines of \$100,000, and "[c]ompliance could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information is released." *Maness v. Meyers*, 419 U.S. at 460. Even in the ordinary case, a witness may challenge a subpoena on the ground that it is "unduly burdensome or otherwise unlawful" and, if contempt is ordered, he may "obtain full review of his claims before undertaking any burden of compliance with the subpoena." *United States v. Ryan*, 402 U.S. at 532, 533 (emphasis added); see also *Cobbledick v. United States*, 309 U.S. at 328. A subpoena that is beyond the power of the court is "unlawful," and that is necessarily an issue that any witness may raise.¹²

In this case, USCC/NCCB have an especially strong interest in challenging the court's power to issue the subpoenas, for the exercise of that power has an undeniable impact upon the Catholic Church's rights of free speech and free exercise of religion. Churches and other religious organizations rightly consider it their obligation to speak out on the moral aspects of social, economic and political issues. The Roman Catholic Church is no exception. The bishops who comprise the USCC/NCCB have stated that

[i]t is the Church's role as a community of faith to call attention to the moral and religious dimension

¹² The court of appeals majority believed that a witness may only raise legal objections that "concern[] the witness personally." Pet. A. 10a. But when a contempt order is entered, "the matter *becomes personal* to the witness and a judgment as to him." *Alexander v. United States*, 201 U.S. 117, 122 (1906) (emphasis added). At that point, if not before, all issues affecting the validity of the court's exercise of power—including the existence of judicial power—"concern the witness personally."

of secular issues, to keep alive the values of the Gospel as a norm for social and political life, and to point out the demands of the Christian faith for a just transformation of society.¹³

The right of religious organizations to address such issues is well established. "Adherents of particular faiths and individual churches frequently take strong positions on public issues. . . . Of course, churches as much as secular bodies and private citizens have that right." *Walz v. Tax Commission*, 397 U.S. 664, 670 (1970); see also *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality opinion); *id.* at 640 (Brennan, J., concurring).

Forcing the Roman Catholic bishops of the United States to disclose internal documents to persons who oppose the Church's religious teaching on abortion would intrude upon the Church's exercise of its First Amendment rights in the past and discourage the full expression of those rights in the future. Cf. *NAACP v. Alabama*, 357 U.S. 449 (1958). In fact, the Church's religious liberty and freedom of expression are threatened by the very pendency of this action, which seeks to strip USCC/NCCB and the Catholic Church in general of their tax exemptions based on activities allegedly undertaken to promote their religious beliefs.¹⁴ No one has a greater interest in establishing the court's lack of power

¹³ *Political Responsibility: Choices for the Future, A Statement of the Administrative Board of the USCC* 4 (September 1987). This statement addresses the following issues in addition to abortion: arms control and disarmament, capital punishment, civil rights, the economy, education, family life, food and agricultural policy, health, housing, human rights, immigration and refugee policy, mass media, and regional conflict in the world.

¹⁴ Recognizing the sensitivity of inquiries into a church's compliance with the Internal Revenue Code, Congress has placed strict limitations upon church tax inquiries and examinations. 26 U.S.C. § 7611 (1987); see H.R. Conf. Rep. No. 861, 98 Cong., 2d Sess. 1101-1114 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News 1445, 1789-1802. See p. 45-46, *infra*.

over this case than USCC/NCCB. They are, after all, the real targets of the suit.

3. *The Court of Appeals Misread Blair v. United States*

Much of the majority's analysis was based upon an unprecedented expansion of this Court's decision in *Blair v. United States*, 250 U.S. 273 (1919). That case concerned the broad investigative power of the grand jury, which, unlike a court in a civil case, "does not depend on a case or controversy for power to get evidence." *United States v. Morton Salt Co.*, 338 U.S. at 643. See also *United States v. Bisceglia*, 420 U.S. at 148; *United States v. Powell*, 379 U.S. at 57. *Blair* simply did not address the more limited judicial subpoena power conferred by Article III.

Blair held that a witness could not object to a grand jury subpoena by attacking the constitutionality of the statute he speculated was the basis of the investigation. The reason stemmed from the nature of a grand jury proceeding. The grand jury is an investigative body and, as this Court explained, the witness "is not entitled to set limits to the investigation that the grand jury may conduct." 250 U.S. at 282. The "examination of witnesses by a grand jury need not be preceded by a formal charge." *Ibid.* Indeed, the "question whether the facts show a case within [the grand jury's] jurisdiction" and, if so, the "precise nature of the offense . . . normally are developed at the conclusion of the grand jury's labors, not at the beginning." *Id.* at 282-83 (citation omitted). It is premature and speculative for a witness to anticipate these matters by raising a constitutional challenge to a statute that may or may not be invoked against him.

The grand jury witness, in other words, is "not interested" to challenge the constitutionality of such a statute, *id.* at 279, because a successful challenge "would not give the witness the relief he sought." Pet. A. 34a (Cardamone, J., dissenting). The grand jury could subpoena

him anyway, because the "jurisdiction" of the grand jury does not depend upon the constitutionality of any particular statute that may have been violated.

Because a court in a civil case, unlike a grand jury, depends on a case or controversy for its power to get evidence, the subpoenaed witness may challenge the existence of a case or controversy. And ordinarily such a challenge cannot be dismissed as premature or speculative. Unlike a grand jury proceeding, a civil case is initiated by a formal complaint that must satisfy the requirements of Article III. The precise nature of the claim is stated "at the beginning" of the case, not at its "conclusion." *Id.* at 282. And in the ordinary civil case, unlike a grand jury proceeding, it can be determined at the outset "whether the facts show a case within [the court's] jurisdiction." *Id.* at 283. Of course, if the court's jurisdiction is uncertain, the court has power to order discovery to determine its jurisdiction. But when, as in this case, it can be determined at the outset whether the court has Article III power, there is nothing in *Blair* that bars the witness from raising the issue, or that disables the court from deciding it.¹⁵

II. THE DISTRICT COURT WAS WITHOUT ARTICLE III POWER BECAUSE THE PLAINTIFFS LACKED ARTICLE III STANDING

This Court's prior standing decisions make clear that Article III power is lacking in this case, and that the contempt judgments therefore must be set aside. Indeed,

¹⁵ A recent decision underscores the limited scope of *Blair*, even in the grand jury context. *In re Sealed Case*, 827 F.2d 776 (D.C. Cir. 1987). Distinguishing the "speculativ[e]" challenge asserted in *Blair*, the court held that a grand jury witness may defend against a grand jury subpoena and subsequent contempt charge by challenging the authority of the prosecutor to act. *Id.* at 779. See also *In re Perlin*, 589 F.2d 260 (7th Cir. 1978); *In re Subpoena of Persico*, 522 F.2d 41 (2d Cir. 1975); *DiGirolomo v. United States*, 520 F.2d 372 (8th Cir.), *cert. denied*, 423 U.S. 1033 (1975).

applying the court of appeals' test, the claim of standing here is not even "colorable."

Lawsuits challenging the tax status of others "are rarely if ever appropriate for federal-court adjudication." *Allen v. Wright*, 468 U.S. 737, 760 (1982). This case dramatically illustrates why. None of the plaintiffs here alleges that his own tax status is in jeopardy. None wishes to change his tax status. None claims that he has tried to do what he contends the Catholic Church does, only to be threatened by the government. In short, none alleges improper or unequal treatment at all by the government. Nevertheless, each of the plaintiffs attacks the government's treatment of some 30,000 Roman Catholic Church entities, the vast majority of which are located nowhere near the communities in which the plaintiffs reside. Even if all of the plaintiffs' allegations were true, revoking the tax-exempt status of these Church entities would not confer any benefit, or relieve any burden, on the plaintiffs.

In fact, in the final analysis, a judgment in the plaintiffs' favor in this case would accomplish virtually nothing. The Catholic Church entities are not parties, and would not be bound by any judgment. They have a statutory right, which they would undoubtedly invoke, to bring a separate declaratory judgment action to determine the legality of any revocation of their tax exemption. 26 U.S.C. § 7428. The issue of their eligibility for tax-exempt status would be relitigated *de novo*. Thus, the "controversy" over the tax-exempt status of the Roman Catholic Church in the United States, if indeed there is one, would not be resolved by this lawsuit. Any judgment would serve, at most, as advice for the court that would have to decide the controversy in litigation between the only parties whom it concerns.

A. Unaffected Third Parties Lack Article III Standing To Challenge the Tax-Exempt Status of Others

This Court has repeatedly insisted that "at an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (citations omitted). "The injury alleged must be . . . 'distinct and palpable,' and not 'abstract' or 'conjectural' or 'hypothetical.'" *Allen v. Wright*, 468 U.S. at 751 (citations omitted). This Court has thus refused to entertain a variety of suits premised only upon "the value interests of concerned bystanders," *United States v. SCRAP*, 412 U.S. 669, 687 (1973), or upon "the right, possessed by every citizen, to require that the Government be administered according to law.'" *Valley Forge*, 454 U.S. at 482-83, quoting *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922). See also *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *Ex parte Levitt*, 302 U.S. 633 (1937).¹⁶

¹⁶ In *Valley Forge*, 454 U.S. at 482-85, and *Allen v. Wright*, 468 U.S. at 754-56, the Court made clear that it is Article III itself, not merely the prudential limitations on standing, that bars suits based on the generalized right to have the government act in accordance with the law. But even if the principle were treated as a prudential limitation, the witnesses here would be entitled to raise it. The prudential limitations on standing are "closely related to Art. III concerns," *Warth v. Seldin*, 422 U.S. 490, 500 (1975), and sufficiently "jurisdictional" that they must be considered by the court even if they are not raised by a party. See *Hodel v. Irving*, 107 S.Ct. 2076, 2080 (1987). It necessarily follows that those limitations may be raised by an alleged contemnor, who is entitled to challenge the underlying order as "erroneously issued" or "beyond the jurisdiction of the Court." *United Mine Workers*, 330 U.S. at 295.

Based on these principles, this Court has twice rejected challenges to the tax-exempt status of third parties, when the would-be plaintiff's own tax status is not in issue. In *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), indigent persons challenged a revenue ruling that a non-profit hospital could qualify for recognition as a charitable organization under section 501(c)(3), even though it provided only emergency room service to persons unable to afford hospitalization. This Court acknowledged the plaintiffs' interest in obtaining hospital services, and even acknowledged that some plaintiffs had been injured by the hospitals in question. *Id.* at 40-41. Nevertheless, the Court held that those facts were insufficient to establish a case or controversy with the Treasury, because the plaintiffs had failed "to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.'" *Id.* at 45, quoting *Warth v. Seldin*, 422 U.S. at 505.

Similarly, in *Allen v. Wright*, 468 U.S. 737 (1984), the Court held that parents of black public school children lacked standing to challenge the lawfulness of the IRS's grant of tax-exempt status to allegedly discriminatory private schools. "[S]tigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race" was insufficient to support standing, the Court held. *Id.* at 754. The plaintiffs also claimed that they had standing because the government's administration of the tax laws "diminished [their children's] ability to receive an education in a racially integrated school." *Id.* at 756. The Court recognized the "serious" nature of that injury, and "the constitutional importance of curing" it, but held that the injury could not support standing because it was "not fairly traceable to" the challenged granting of tax exemptions. *Id.* at 756-57. It was "entirely speculative," the Court explained, that any judg-

ment in the plaintiffs' favor "would have a significant impact on the racial composition of the public schools." *Id.* at 758.

Like the plaintiffs in *Simon* and *Allen*, the plaintiffs here are unhappy because, they assert, the IRS has not enforced section 501(c)(3) against others in the way they would like. The injuries these plaintiffs allege, however, are more abstract than those asserted in *Simon* and *Allen*. While those plaintiffs complained of the denial of medical services, and of the opportunity for an integrated education, these plaintiffs claim only some vague impairment of their stakes as voters and clergymen who oppose the Catholic Church's religious teaching on abortion. Allegations such as those made by the plaintiffs here could be made by virtually anyone who disagrees with the Catholic Church's position on abortion—or, for that matter, by virtually anyone who disagrees with the statements of any religious organization on a broad range of moral issues that confront the American public. See fn. 13, *supra*. Under this Court's precedents, such allegations are insufficient to confer standing.

B. The Clergy Plaintiffs Lack "Establishment Clause Standing"

The plaintiffs who are clergymen claim that the government's alleged failure to enforce the tax code against the Catholic Church violates their "sincere and deeply held belief in the separation of church and state," JA 45; see also JA 52, and their "right to live in a society in which no religion is favored or established by the state." JA 44; see also JA 54. These allegations, however, are no different from the allegations rejected as an insufficient basis for standing in *Valley Forge*. In that case, this Court held that citizens and taxpayers lacked standing under Article III to challenge the conveyance of surplus federal property to a religious college. The Court acknowledged the plaintiffs' commitment to separation of church and state, but held that they

fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Article III, even though the disagreement is phrased in constitutional terms.

454 U.S. at 485-86 (emphasis in original). Here, as in *Valley Forge*, the plaintiffs "cannot . . . satisfy the requirements of Art. III" by alleging injury to a generalized "right to a government that 'shall make no law respecting the establishment of religion.'" *Id.* at 482-83. See also *Allen*, 468 U.S. at 754; *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. at 217, 226-27.

The district court in this case stated, however, that the clergy plaintiffs and the church-affiliated Women's Center for Reproductive Health had alleged a "spiritual injury" flowing from "the tacit government endorsement of the Roman Catholic Church position on abortion." Pet. A. 67a, 68a. Their beliefs were somehow "denigrated," and their ministries "frustrate[d]," the district court concluded. . . . government endorsement of a [contrary] theology." Pet. A. 68a. The amended complaint contains no such allegations of denigration or stigma, however, and the affidavits of the clergy plaintiffs contain only the vaguest of assertions on the subject.¹⁷ Standing,

¹⁷ The affidavit of one clergy plaintiff states, for example, that the IRS "seems to have done nothing about" instances in which Catholic priests have "denounced candidates from the pulpit," and that the IRS's failure to act

denigrates my standing and the standing of my religion in the community. We are made to feel that we are second class citizens because we are not permitted to violate the law with impunity and because the government appears to consider our views not to be as worthy of attention as those of the Catholic Church. JA 44.

[Continued]

in any event, cannot be predicated upon the district court's conclusions for two reasons: (1) as a matter of law, the plaintiffs have suffered no cognizable denigration or stigma; and (2) even if they have, they have not alleged that it has resulted from their having been "personally denied equal treatment." *Allen*, 468 U.S. at 755.

First, the IRS cannot be said to have "endorsed" the Catholic Church's view on abortion, tacitly or otherwise. And it certainly has not made "an unequivocal statement of preference" for the Catholic religion generally, as the district court suggested. Pet. A. 69a. All churches represented by the plaintiffs—and countless other churches as well—enjoy tax-exempt status under section 501(c)(3). The allegation here is simply that the IRS has not applied the political activity limitation of section 501(c)(3) against the Catholic Church in the manner that these plaintiffs would like. Even if the plaintiffs' allegations are accepted as true, the IRS's alleged failure to take the demanded enforcement measures falls far short of an "unequivocal" or even "tacit" "endorsement" of the Catholic Church's theology. Pet. A. 68a, 69a. The alleged enforcement failure could have been based on any of a number of considerations—if, indeed, there has been a conscious decision at all. As a matter of law, the failure to revoke the Catholic Church's tax exemption cannot be said to stigmatize or denigrate non-Catholics.

The suggestion of stigma or denigration in this case pales by comparison to the comparable allegation rejected in *Allen*. The plaintiffs in *Allen* complained of racial discrimination, which historically has carried with

¹⁷ [Continued]

There is no suggestion anywhere, however, that any of the clergy plaintiffs has been stopped from doing anything that Catholic clergy have allegedly done. See note 18, *infra*.

Another clergy plaintiff states that "it appears that Catholic doctrine is being favored by the government and, therefore, must be more correct than my religion's teachings." JA 47.

it an undeniable mark of perceived inferiority. The allegation of stigma in *Allen*, while too generalized to support standing, was nonetheless genuine. By contrast, the suggestion of "denigration" here is baseless.

Second, even if the clergy plaintiffs were assumed to have suffered "stigma" as a result of the IRS's treatment of the Catholic Church, that "stigma" would not support standing because it was not the result of any action directed against the clergy plaintiffs personally or even against their religions. In *Allen*, this Court emphasized that even when racial stigma is alleged, "[stigmatic] injury accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." 468 U.S. at 755 (emphasis added) (citation omitted).

The clergy plaintiffs in this case make no such claim. They allege no enforcement or threatened enforcement of the tax code against themselves personally or against their churches. They do not allege that they have engaged in activities similar to those allegedly engaged in by Catholic Church entities, only to be denied tax exemptions. Nor do they claim that they have been subjected to any unequal or unfair treatment whatsoever by the IRS.¹⁸ Indeed, the district court denied the plaintiffs what it termed "equal protection standing" precisely because "plaintiffs . . . do not assert that the code has been applied to them discriminatorily or that they have been de-

¹⁸ The clergy plaintiffs complain simply that they are "law-abiding clergymen" who voluntarily "refrain from participating in political campaigns for fear of losing the tax exemption of their congregations and churches," Amended Complaint ¶ 42, JA 15-16, while the Catholic Church does not. But that is not an allegation that the IRS has subjected them to unequal or unfair treatment. Nor is the mere allegation that one has refrained from violating the law an allegation of injury that is cognizable under the law, even if it is alleged that others have violated the law without consequence.

nied some tax benefits to which they are entitled." Pet. A. 76a.

That same observation is fatal to the plaintiffs' claim of "Establishment Clause standing." In *Valley Forge* the Court explicitly rejected the notion "that enforcement of the establishment clause demands special exceptions from the requirement that a plaintiff allege 'distinct and palpable injury to himself' . . . that is likely to be redressed if the requested relief is granted." 454 U.S. at 488 (citations omitted) (emphasis added). The Court also emphasized that a claimed "spiritual stake" in the government's alleged preference of a particular religion cannot support standing unless the plaintiffs can show that they were "'directly affected by the laws and practices against which their complaints are directed.'" 454 U.S. at 486-87 n.22, quoting *Abington School District v. Schempp*, 374 U.S. 203, 224 n.9 (1963) (emphasis added).¹⁹

The plaintiffs here were not "directly affected" by the IRS action against which their complaint is directed. *Ibid.* Like the plaintiffs in *Valley Forge*, they can claim nothing more than an abstract "spiritual stake" in blocking the conferral of a benefit on a religious group to

¹⁹ The district court thought that the clergy plaintiffs satisfied this requirement of *Valley Forge* and *Schempp* because, in its words, the IRS's action had allegedly "diminish[ed] their position in the community, encumber[ed] their calling in life, and obstruct[ed] their ability to communicate effectively their religious message." Pet. A. 95a-96a. But that is simply a more elaborate way of saying that the clergy plaintiffs allegedly suffered stigma. It does not establish that the clergy plaintiffs were "directly affected by the [IRS action] against which their complaints are directed." *Valley Forge*, 454 U.S. at 487 n.22; *Schempp*, 374 U.S. at 224 n.9. In *Schempp*, the plaintiffs could show they were directly affected by the challenged laws and practices, "because impressionable school-children were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 487 n.22. There is no comparable claim here.

which they do not belong.²⁰ Whether the spiritual injury is described as a preference for one religion or denigration of others, it is insufficient to support standing. As this Court explained in *Valley Forge*, if such a claim were sufficient, then "any person asserting an Establishment Clause violation possesses a 'spiritual stake' sufficient to confer standing." 454 U.S. at 486 n.22.

Allowing these clergy plaintiffs to sue the IRS when they themselves have not been "directly affected" by the IRS's actions, *Valley Forge*, 454 U.S. at 487 n.22, or "personally denied equal treatment," *Allen*, 468 U.S. at 755, would have precisely the same consequences that the Court feared in *Allen*. "If the abstract stigmatic injury [asserted here and in *Allen*] were cognizable, standing would extend nationwide to all members of the . . . groups" that feel denigrated. 468 U.S. at 755-56.²¹ This case proves the Court's point. A minister in New York is challenging the tax exemption of the Archdiocese of San Antonio, Texas, and a women's center in Jacksonville, Florida is contesting the government's alleged failure to monitor a parish priest in South Dakota. JA 7, 12. As the Court noted in *Allen*, "[r]ecognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" *Id.* at 756, quoting *United States v. SCRAP*, 412 U.S. at 687.

C. Plaintiffs Have No "Voter Standing"

Plaintiffs claim no cognizable personal injury as voters, much less one that is "fairly traceable" to the IRS's conduct and "likely to be redressed" by judicial action.

²⁰ The plaintiffs in *Valley Forge* were not clergy members, but surely the result would have been no different if they had been. As the Court noted, standing "is not measured by the intensity of the litigant's interest or the fervor of his advocacy." 454 U.S. at 486.

²¹ In many, if not most, Establishment Clause cases, the allegedly "stigmatized" groups would include a majority of the population.

1. *Plaintiffs Have Suffered No Cognizable Injury as Voters*

Unlike the plaintiffs in *Baker v. Carr*, 369 U.S. 186 (1962), plaintiffs do not allege any diminution in their representation. Nor do they allege gerrymandering, ballot-box-stuffing, outright denial of their right to vote, or anything that dilutes the strength of their votes.²² The plaintiffs therefore lack standing as "voters."

Nor do the plaintiffs acquire standing by presenting themselves more broadly as participants in the political process. At most, they can speculate that others *might* freely choose to vote against their preferred candidates based on information disseminated in the course of political debate, and that their candidates *might* actually be defeated. But that is not a cognizable injury; it is the essence of the democratic process. The injury is also entirely speculative; it can be neither proved nor disproved. Perhaps for that reason the plaintiffs do not make the claim that the alleged political activity of the Church has affected any particular election or even the total number of pro-abortion representatives.²³

As the district court noted, plaintiffs allege simply that there is a "distortion in the political process" that somehow entitles them to challenge the Church's tax exemption, regardless of whether the distortion is likely to affect the outcome of any election. Pet. A. 73a. The plaintiffs, in the district court's words, allege that "members of the public have greater incentive to donate funds to the Roman Catholic Church than to politically active abortion rights groups and . . . each dollar contributed

²² See, e.g., *Davis v. Bandemer*, 106 S. Ct. 2797 (1986); *Karcher v. Daggett*, 462 U.S. 725 (1983); *Wiley v. Sinkler*, 179 U.S. 58 (1900); cf. *United States v. Saylor*, 322 U.S. 385 (1944).

²³ As the district court noted, the claimed injury is "not actual loss of representatives vis-a-vis other groups" Pet. A. 75a n.10.

to the church is worth more than one given to non-exempt organizations." Pet. A. 73a.

The plaintiffs, however, are not recipients of campaign contributions alleging that their receipts have been adversely affected. They are voters and campaign contributors.²⁴ And they do not contend that their own contributions to political candidates ought to be tax deductible. They affirmatively disclaim that notion. Thus, the plaintiffs do not allege that they are being financially injured. They allege only that the Catholic Church is being financially benefited. And that allegation—that the government has improperly conferred a benefit upon a third party—is precisely the kind of claim that was rejected as an insufficient basis for standing in *Valley Forge*.

However it is described, the "distortion in the political process" alleged here is simply not a "distinct and palpable injury" to those who participate in the process as voters and contributors. *Warth v. Seldin*, 422 U.S. at 501. Such a "distortion" is no less abstract than the distortion of the legislative process found insufficient to support standing in *Schlesinger v. Reservists Committee to Stop the War*, *supra*. In that case, citizens complained that allowing Armed Forces Reserve members to sit in Congress violated the Incompatibility Clause of the Constitution, which states that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const., Art. 1, § 6, cl.2. The alleged injury was a distortion of the legislative process in the form of "undue influence by the Executive Branch" on Reservist Members of Congress. 418 U.S. at 212. That distortion of the legislative

²⁴ The district court held that the organizational plaintiffs had standing as representatives of their voter members. Pet. A. 70a n.9, 91a.

process, the Court held, although concededly a matter in which citizens have "an interest," was "too abstract to constitute a 'case or controversy' appropriate for judicial resolution." *Id.* at 226-27.²⁵

The same conclusion holds true here.²⁶ If the plaintiffs here could establish standing merely by alleging a distortion of the political process, then voters and contributors could challenge not only a great many IRS decisions, but virtually all Federal Election Commission decisions. The interest of the individual citizen in those decisions, however, is no greater than the generalized interest of the citizenry in "hav[ing] the Government act in accordance with law"—an interest that "'cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.'" *Allen*, 468 U.S. at 754, quoting *Valley Forge*, 454 U.S. at 483.

²⁵ The fact that the distortion of the legislative process might have impaired the effectiveness of the plaintiffs' own political activity—their lobbying to end the Vietnam war was allegedly frustrated by the presence of Reserve officers in the Congress—did not make a difference. The district court rejected the claim of standing based on the plaintiffs' political activity in opposition to the war, and the plaintiffs did not challenge that ruling in this Court. 418 U.S. at 210 n.1, 211, 216.

²⁶ The allegations here are also analogous to the allegation of "competitive injury, stemming from a systematic distortion of the marketplace," found insufficient to support a third-party tax challenge in *American Society of Travel Agents v. Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978). See *id.* at 159 (Bazelon, J., dissenting). A group of travel agents sued to revoke the tax-exempt status of the American Jewish Congress for engaging in competitive business activity allegedly prohibited by § 501(c)(3). The court found the allegation that the government had conferred an "unfair competitive advantage" on the tax-exempt organizations too "abstract" to constitute a "judicially cognizable 'injury in fact.'" *Id.* at 148-49. See also *Khalaf v. Regan*, 85-1 U.S. Tax Cases ¶ 9269 (D.D.C. 1985), *aff'd*, No. 83-02963 (D.C. Cir. Sept. 19, 1986) (unpublished opinion) (individuals and non-exempt political advocacy groups lack standing based on claim that tax-exempt status accorded to Jewish organizations disadvantaged them in pursuit of their political objectives).

2. Plaintiffs' Claimed Injury Is Neither "Fairly Traceable" to the IRS Nor Likely To Be Redressed by the Requested Relief

To the extent that the plaintiffs claim that the Church's alleged political activity has impaired their own ability to accomplish their political objectives, they encounter the same barrier as the plaintiffs in *Simon* and *Allen*:

From the perspective of the IRS, the injury to respondents is highly indirect and "results from the independent action of some third party not before the court"

468 U.S. at 757, quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 42. The IRS has not directly impaired the plaintiffs' political efforts; if anyone is alleged to have done so, it is "a third party not before the court," the Catholic Church. *Ibid.* And even the Church's alleged activities could have had only an indirect and speculative effect upon the plaintiffs' own political efforts.

In *Allen*, this Court held that the plaintiffs' alleged injury was not "fairly traceable" to the government, because it was "entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies." 468 U.S. at 758. It was "just as speculative whether any given parent would decide to transfer [his or her] child to public school" as a result of the school's loss of its tax-exempt status. *Ibid.* It was also "pure speculation" whether a sufficiently large number of such decisions would be made to have a "significant impact on the racial composition of the public schools." *Ibid.*

Similarly, in *Simon*, the Court found it "purely speculative" whether the alleged denial of medical services to indigents "fairly can be traced to [the IRS's action] or instead result from decisions made by the hospitals without regard to the tax implications." 426 U.S. at 42-43.

It was "equally speculative" whether a judgment against the IRS would cause the hospitals to provide more free services or instead to forego their tax exemptions. *Id.* at 43. Thus, the plaintiffs failed "to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief [would] remove the harm.'" *Id.* at 45, quoting *Warth v. Seldin*, 422 U.S. at 505. See also *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973) (mother lacked standing to challenge non-prosecution of father for failure to pay child support, because it was "only speculative" that prosecution would result in payment of support).

Here too, "[s]peculative inferences are necessary to connect [the plaintiffs' alleged] injury to the challenged actions of [the IRS]." *Simon*, 426 U.S. at 45. It is speculative whether, or to what extent, the Church's donors would reduce their contributions if the Church's tax exemption were revoked. As plaintiffs themselves allege, contributions to the Church are "religiously-compelled," JA 16; therefore, they may be not responsive to tax pressure. It is equally speculative whether the Church would decide to stop the religiously-motivated activities that are under attack, such as "hand[ing] out 'right-to-life' leaflets with . . . church bulletin[s]." JA 13.²⁷

Finally, it is speculative in the extreme whether all of the foregoing would lead to fewer pro-life votes. In *Winpisinger v. Watson*, 628 F.2d 133, cert. denied, 446 U.S. 929 (1980), the U.S. Court of Appeals for the D.C. Circuit held that supporters of Senator Edward Kennedy for the Democratic presidential nomination lacked standing to claim that members of President Carter's administration had illegally spent federal funds to promote the

²⁷ See note 13, *supra*, and accompanying text. Even if the Church were to cease any activity that it is now engaged in, it is speculative to suggest that its members would not feel an obligation to fill the void.

President's renomination. The plaintiffs' alleged harm was "the dilution of their efforts on Senator Kennedy's behalf by the actions of the federal defendants in utilizing the vast resources available to the Administration to promote President Carter's quest for renomination." *Id.* at 138. The Court held that there was no fairly traceable causal connection between the claimed injury and the challenged conduct. Its explanation is fully applicable here:

The endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, caucuses and conventions forecloses any reliable conclusion that voter support of a candidate is 'fairly traceable' to any particular event. In the case before us, whether [a plaintiff] is viewed in the character of a voter, contributor, a noncontributing supporter or a candidate for a delegate post, a court would have to accept a number of very speculative inferences and assumptions in any endeavor to connect his alleged injury with activities attributed to [the defendants]. Courts are powerless to confer standing when the causal link is too tenuous.

Id. at 139, citing *Linda R.S. v. Richard D.*, 410 U.S. at 618 (1972), and *Simon*, 426 U.S. at 45.

Plaintiffs effectively concede that it would be speculative to suggest that a judgment in their favor would alter the Church's conduct, much less result in the election of more pro-abortion candidates. They profess indifference to whether the Church modifies its alleged political activities in any way. "It is irrelevant," they assert, "whether the Church will continue to be active politically or if its members will increase their donations." Respondents' Brief in Opposition at 54. If, however, a judgment against the IRS would not alter the alleged political activities of the Church and its contributors, then the plaintiffs would gain nothing other than the psychological pleasure of knowing that the Church has lost its exemp-

tion. But that sort of satisfaction, this Court has made clear, is insufficient to support standing. *Allen*, 468 U.S. at 754; *Valley Forge*, 454 U.S. at 482-87; *Schlesinger*, 418 U.S. at 217, 226-27.²⁸

In sum, the plaintiffs have failed to allege any distinct and palpable personal injury that is fairly traceable to the IRS's actions and likely to be redressed by a favorable decision.

D. The Doctrine Of Separation Of Powers And Related Prudential Concerns Preclude Standing

As in *Allen*, this Court "could not recognize respondents' standing in this case without running afoul of [a basic] structural principle"—namely, that "[t]he Constitution . . . assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.' U.S. Const., Art. II, § 3." 468 U.S. at 761.²⁹ Enforcement decisions are "the special province of the Executive Branch." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). Even to require the IRS to investigate the tax status of the 30,000 Church entities involved in this case would result in the diversion of government resources from enforcement efforts that

²⁸ There is an additional reason why a judgment in this case would not alter the conduct of the Church or its contributors, and why the plaintiffs' alleged injury is not "likely to be redressed by the requested relief" in this case. *Allen*, 468 U.S. at 751. As noted above, at p. 27, even if the plaintiffs were to prevail, the Church entities, who are not parties in this case, would be entitled to litigate their tax-exempt status *de novo* in a separate declaratory judgment action under 26 U.S.C. § 7428. Even if that did not affect the plaintiffs' Article III standing, the inevitable duplication of judicial effort would present a prudential reason for declining to exercise the judicial power in this case. See note 16, *supra*.

²⁹ Even if the considerations discussed in this section do not establish an outright violation of the separation of powers doctrine, they present a prudential reason for declining to recognize the plaintiffs' standing. See note 16, *supra*; *Valley Forge*, 454 U.S. at 474-75.

would otherwise have been given a higher priority. See *ibid*. That intrusion of the courts into the law enforcement activities of the Executive Branch would itself undermine the constitutional separation of powers.

To require the IRS actually to take action against these Church entities would be an even greater intrusion into the prerogatives of the Executive, for "an agency's decision to . . . enforce . . . is a decision generally committed to an agency's absolute discretion." *Id.* at 831 (citations omitted). Absent an allegation that the government has failed "to enforce specific legal obligations whose violation works a direct harm," the courts are not empowered to second-guess the Executive Branch's enforcement activities. *Allen*, 468 U.S. at 761; see *Linda R.S. v. Richard D.*, 410 U.S. at 619 ("a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another").

Congress has delegated "the administration and enforcement of" the tax laws—including the power to "prescribe all needful rules and regulations"—to the Secretary and the Commissioner. 26 U.S.C. §§ 7801(a), 7805(a). Congress itself exercises oversight through the Joint Committee on Taxation. See 26 U.S.C. §§ 8001-8023. And while the courts obviously play an important role in the enforcement of the Code, their role is generally limited to resolving controversies that arise between a taxpayer and the IRS. See 26 U.S.C. §§ 6212-13, 6532, 7422; 28 U.S.C. § 1346. Indeed, when Congress authorized declaratory judgment actions for determinations of an organization's eligibility for a tax-exemption under section 501(c)(3), it expressly provided that such an action "may be filed only by the organization the qualification or classification of which is at issue." 26 U.S.C. § 7428(b)(1); see also 28 U.S.C. § 2201(a).³⁰

³⁰ The district court dismissed the plaintiffs' claim for declaratory relief based on 26 U.S.C. § 7428 and 28 U.S.C. § 2201. Pet. A. 87a-

IRS determinations to grant tax-exempt status to an organization involve numerous discretionary judgments that are, as a general matter, inappropriate for judicial review at the behest of a mere bystander. There are, for example, six pages of regulations governing the threshold determination of whether an organization has a proper purpose within the meaning of section 501(c)(3). See 26 C.F.R. § 1.501(c)(3)-1 (1987). Implementation of the political activity limitation is itself a matter of considerable complexity.³¹ For example, the IRS has determined that it is permissible for an exempt organization to publish voter guides stating the position of incumbents on a wide range of issues, or to distribute questionnaires to candidates on such issues. Rev. Rul. 78-248, 1978-1 C.B. 154. The Service has stated, however, that voter guides or questionnaires are impermissible if they "[e]vidence a bias on certain issues," or concentrate on a "narrow range of issues," even if not expressly stating support for, or opposition to, any candidate. *Ibid.* See also Rev. Rul. 80-282, 1980-2 C.B. 178.

91a. But the court rejected the argument of the government and USCC/NCCB that the plaintiffs' claim for injunctive relief was barred by those provisions, as well as the Anti-Injunction Act, 26 U.S.C. § 7421(a). *Ibid.* This Court left those questions open in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 34-35, 37, and *Bob Jones University v. Simon*, 416 U.S. 725, 732-33 n.7 (1974).

³¹ A House Subcommittee recently found that the lobbying and political activity restrictions have

given rise to a set of complex and at times inexact rules that are difficult to comply with and administer. The rules are complex because there are different rules for different types of organizations. The rules are sometimes inexact because of the imprecise definitions of lobbying and political activity. For example, it is often very difficult to distinguish lobbying or political activity from educational activity.

Subcommittee on Oversight of the Committee on Ways and Means, U.S. House of Representatives, 100th Cong., 1st Sess., *Report and Recommendations on Lobbying and Political Activities by Tax-Exempt Organizations* 37 (Comm. Print 1987).

In applying section 501(c)(3), the IRS has developed a body of experience and expertise to which the courts owe deference.³² An IRS judgment not to take enforcement action based on alleged violations of the requirements of section 501(c)(3) is generally "unsuit[ed] for judicial review" for precisely the reasons stated in *Heckler v. Chaney*, 470 U.S. at 821:

[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. *Id.* at 831-32.³³

There are finally, additional reasons not to permit third-party tax challenges to the tax status of a church. Recognizing the First Amendment rights at stake, Congress has imposed strict limits on church tax inquiries and examinations. 26 U.S.C. § 7611.³⁴ An inquiry may

³² Cf. *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 476-77 (1979); *Bingler v. Johnson*, 394 U.S. 741, 748-51 (1969).

³³ *Heckler v. Chaney* did not involve constitutional standing, but the reviewability of an agency's decision under the Administrative Procedure Act, 5 U.S.C. § 701. Nevertheless, the Court's view of the appropriate role of the federal courts in reviewing agency enforcement decisions is fully applicable to the separation-of-powers/standing analysis required by *Allen*.

³⁴ See H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1101-1114 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News 1445, 1789-1802.

be begun only if "an appropriate high-level Treasury official reasonably believes (on the basis of facts and circumstances recorded in writing)" that the church may not be exempt or is engaged in an unrelated trade or business. 26 U.S.C. § 7611(a)(2). The church must be given advance notice of the inquiry and an opportunity to meet with the Secretary before any examination of church records. 26 U.S.C. § 7611(a)(3). Church records may be examined "only . . . to the extent necessary to determine" any tax liability. 26 U.S.C. § 7611(b)(1).³⁵ Church tax inquiries and examinations must be completed as a general rule within two years. 26 U.S.C. § 7611(c). And no revocation of a church's tax exempt status may occur unless the regional counsel approves the revocation in writing and determines in writing that there has been substantial compliance with the requirements of section 7611.

Notwithstanding this elaborate statutory framework for the conduct of church tax inquiries and examinations, the plaintiffs would have a single district court judge launch a broad investigation into the tax-exempt status of some 30,000 Catholic Church entities throughout the United States. The court would presumably examine why the IRS has not taken enforcement action and whether, despite the IRS's judgment not to take action, those Catholic Church entities should lose their tax exemptions because some of them are alleged by private parties, "upon information and belief," to have crossed the line separating permissible from impermissible political activity.

Quite apart from the burden such a task would impose on the courts and the IRS, the nature of the task is such that it should not be undertaken at the behest of

³⁵ This provision would appear to impose stricter limits upon the examination of church records than the Federal Rules of Civil Procedure would impose upon these plaintiffs if this case were allowed to proceed.

these plaintiffs. Monitoring the IRS's performance in implementing and enforcing section 501(c)(3) of the tax Code "is appropriate for the Congress acting through its committees . . . ; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful action." *Laird v. Tatum*, 408 U.S. 1, 15 (1972). In this case, the plaintiffs point to no injury that is sufficient to warrant the extraordinary judicial undertaking that they seek. They are, therefore, without standing.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE AND
NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
PETITIONERS

v.

ABORTION RIGHTS MOBILIZATION, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF FOR THE FEDERAL RESPONDENTS
IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Whether the order holding petitioners in contempt for failure to comply with a discovery order should be set aside on the ground that the plaintiffs lack standing to bring the underlying lawsuit.

II

PARTIES TO THE PROCEEDING

In addition to Abortion Rights Mobilization, Inc., Lawrence Lader, Margaret O. Strahl, M.D., Helen W. Edey, M.D., Ruth P. Smith, National Women's Health Network, Inc., Long Island National Organization for Women-Nassau, Inc., Rabbi Israel Margolies, Reverend Bea Blair, Rabbi Balfour Brickner, Reverend Robert Hare, Reverend Marvin G. Lutz, Women's Center for Reproductive Health, Jennie Rose Lifrieri, Eileen Walsh, Patricia Sullivan Luciano, Marcella Michalski, Chris Niebrzydowski, Judith A. Seibel, Karen DeCrow, and Susan Sherer are also plaintiffs in the district court and respondents here. James A. Baker, III, Secretary of the Treasury, and Lawrence B. Gibbs, Commissioner of Internal Revenue, are defendants in the district court and respondents here.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-416

UNITED STATES CATHOLIC CONFERENCE AND
NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
PETITIONERS

v.

ABORTION RIGHTS MOBILIZATION, INC., ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT*

**BRIEF FOR THE FEDERAL RESPONDENTS
IN SUPPORT OF PETITIONERS**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 824 F.2d 156. The opinion of the district court holding petitioners in contempt (Pet. App. 44a-51a) is reported at 110 F.R.D. 337. The opinions of the district court denying the motions to dismiss (Pet. App. 54a-92a, 93a-102a) are reported at 544 F. Supp. 471, and 603 F. Supp. 970, respectively.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1987. A petition for rehearing was denied on July 30, 1987 (Pet. App. 103a-104a). The petition for a writ of certiorari was filed on September 11, 1987, and was granted on December 7, 1987. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2, of the Constitution provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT

1. The non-federal respondents are various individuals and tax-exempt organizations that support the availability of legal abortion. They brought this suit in the United States District Court for the Southern District of New York, seeking to compel the Secretary of the Treasury and the Commissioner of Internal Revenue to revoke the tax exemption of the Roman Catholic Church.¹ The amended complaint (J.A. 5-19) described the action as one for equitable relief “to enforce the doctrine of the separation of church and state” (J.A. 5). It alleged that

¹ The suit also named as defendants the petitioners, the United States Catholic Conference (USCC) and the National Conference of Catholic Bishops (NCCB), which are the two principal national organizations of the Roman Catholic Church in the United States. Petitioners hold an “umbrella” exemption under Section 501(c)(3) of the Internal Revenue Code, covering tens of thousands of individual entities (including dioceses, parishes, schools, and hospitals), which are part of, or affiliated with, the Roman Catholic Church in the United States (Pet. App. 58a-59a). The district court ruled, however, that the complaint failed to state a claim against petitioners because they were entitled to rely upon tax exemptions granted by the government. Accordingly, petitioners were dismissed as defendants (Pet. App. 84a, 91a).

the individual plaintiffs are taxpayers and registered voters and that five of them are clergy of the Jewish or Protestant faiths whose religious beliefs “hold it permissible for women to choose to have abortions” (J.A. 7, 9).

The amended complaint alleged that the Roman Catholic Church, using tax-deductible contributions, has “participated in political campaigns in all parts of the country,” assertedly “supporting ‘pro-life’ and opposing ‘pro-choice’ candidates for public office” (J.A. 11). According to the complaint, the church has regularly contributed money to “right to life groups,” and its clergy have urged their congregants to do the same (J.A. 12-13). The amended complaint alleged that this activity exceeds the limitations placed on organizations classified as tax-exempt under Section 501(c)(3) of the Internal Revenue Code,² but that the Secretary and Commissioner have “consistently overlooked these violations and failed and refused to perform their statutory duty to enforce the Code and the Constitution” (J.A. 10).³ The complaint further alleged that the statutory prohibition on political activity by tax-exempt religious organizations is required by the First Amendment in order to prohibit the “establishment of religion by the federal government” (*ibid.*).

² Unless otherwise noted, all statutory references are to the Internal Revenue Code, as amended (the Code or I.R.C.).

³ Section 501(c)(3) of the Code provides an exemption from federal income tax for an entity “organized and operated exclusively for religious, charitable, * * * or educational purposes, * * * no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h) [which details the permissible limits of expenditures to influence legislation]), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.” Section 501(c)(3) organizations are exempted from income tax, and contributions made to them are generally deductible for federal income tax purposes under Section 170 of the Code, and are also deductible for federal estate and gift tax purposes under Sections 2055 and 2522 of the Code, respectively.

The amended complaint asserted that the challenged conduct of the Church and of the federal defendants "harmed the plaintiffs in numerous ways" (J.A. 14). The clergy plaintiffs claimed that the tax exemption accorded to the Church, whose views on abortion they described as "diametrically opposed" to their own, "is in effect a subsidy of the Church's efforts to further its religious aims in the political sphere" (J.A. 16). According to their affidavits, the government's recognition of the Church's exemption "offends," "demeans," and "denigrates" them and their status in the community, leading them to "feel that [they] are second class citizens" whose religious tenets are less "worthy of attention" than those of the Church (J.A. 44, 45, 49, 52, 54-55). All of the plaintiffs alleged that they are "at a significant disadvantage in the public debate on abortion," assertedly because the Church has "attracted and used tax-exempt, tax-deductible dollars to elect candidates sympathetic to its position, whereas the plaintiffs cannot and have not done so" (J.A. 15). The plaintiffs claimed injury to themselves "[a]s voters" on the theory that the alleged inequality of tax treatment creates a "distortion of the political process" and "impairs and diminishes" their "right to vote" (J.A. 17).

The plaintiffs sought a declaration that both the political activities of the Roman Catholic Church and the alleged "inaction" by the Secretary and the Commissioner violate the Constitution and the Internal Revenue Code. The plaintiffs also sought an injunction directing the Secretary and the Commissioner to revoke the tax exemption of the Church, to assess and collect all taxes thereby made due, and to notify donors that contributions to the Church are no longer tax-deductible (Pet. App. 4a-5a, 60a-61a; J.A. 18-19).

2. The district court denied a motion to dismiss the suit for lack of standing (Pet. App. 54a-92a), and it subsequently denied a renewed motion to dismiss on that ground in light of this Court's intervening decision in *Allen v. Wright*, 468 U.S. 737 (1984) (Pet. App. 93a-

102a). The court held that certain of the plaintiffs have standing to proceed against the federal respondents under one or both of two theories.

First, the court held that both the individual plaintiffs who are members of the clergy and the church-affiliated Women's Center for Reproductive Health have "Establishment Clause standing" (Pet. App. 62a-69a). The court stated that the clergy members "must counsel those in their care in accordance with religious laws that command consideration of abortion as the morally required response to pregnancy" (*id.* at 68a (footnote omitted)), and that the Women's Center "provides guidance to women in decisionmaking on issues pertaining to family life, including childbearing" (*ibid.*). The court characterized the Church's tax exemption as "[t]acit government endorsement" of the Church's position on abortion, and concluded that it caused a "discrete spiritual injury" to some of the plaintiffs because "official approval of an orthodoxy antithetical to their spiritual mission diminishes their position in the community, encumbers their calling in life, and obstructs their ability to communicate effectively their religious message" (*id.* at 67a-68a). In the court's view, this alleged injury would be redressable by "[a] decree ordering the termination of this illegal practice and restoring all sects to equal footing" (*id.* at 69a).

Second, the district court held that all of the individual plaintiffs and three of the advocacy organization plaintiffs, as representatives of their members, have "voter standing," within the meaning of *Baker v. Carr*, 369 U.S. 186 (1962), to challenge "alleged government action which has improperly biased the political process against the discrete group to which they belong" (Pet. App. 72a). In the district court's view, the failure to revoke the Church's tax exemption has "distorted" the electoral process by allowing tax deductions for donations to the Church but not for donations to politically-active abortion rights groups (*id.* at 73a). The court suggested that "[a]n injunction against that discriminatory policy

will restore the proper balance between adversaries in the abortion debate" (*ibid.*).

On both occasions that it denied motions to dismiss, the district court declined to certify the standing question for interlocutory appeal under 28 U.S.C. 1292(b) (see Pet. App. 5a-6a; 552 F. Supp. 364 (1982)). Subsequently, the court of appeals denied the government's petition for a writ of mandamus or prohibition directing the district court to dismiss the complaint for lack of standing. On October 6, 1986, this Court denied the government's petitions for a writ of certiorari to review the court of appeals' order, and, alternatively, for a writ of mandamus directing the district court to dismiss the action (Nos. 86-157 and 86-162).

3. The plaintiffs are currently seeking, through subpoenas and other process, detailed discovery of information concerning the Church's tax status and its alleged lobbying and electioneering activities. To that end, they have requested documents from petitioners and from the Internal Revenue Service. See J.A. 67-79; C.A. App. 160-195, 315-332.⁴ The documents requested from petitioners are voluminous and include the following: records relating to the formulation and interpretation of the bishops' position on abortion; records relating to church officials' contacts with presidential candidates and other candidates for public office; information regarding financial relationships between Catholic institutions and right-to-life organizations; and returns, records, and correspondence submitted by petitioners to the Internal Revenue Service (J.A. 69-73). The plaintiffs have also indicated their intent to depose cardinals and other high-ranking church officials who they believe may be involved in these activities (C.A. App. 200-201).

⁴ The federal respondents have maintained that disclosure of much of the information requested from the government is precluded by Section 6103 of the Code, which prohibits government disclosure of tax returns and confidential return information, except as specifically provided by statute. See C.A. App. 182-195.

The district court narrowed the discovery requests in limited respects, but otherwise ordered petitioners to comply with them (see Pet. App. 48a-49a). Petitioners subsequently advised the court that they "cannot, in conscience, comply with the subpoenas" (*id.* at 44a). On May 8, 1986, the court granted the plaintiffs' motion to hold petitioners in civil contempt for non-compliance with the court's discovery order, and it imposed on each of the petitioners a fine of \$50,000 per day, to begin on May 12, 1986, and to continue "for each day that the USCC/NCCB continues to defy the court's order" (*id.* at 50a-51a). That order was stayed pending appeal, and the stay remains in effect pending this Court's disposition of the case (*id.* at 7a, 105a-110a; Fed. R. App. P. 41(b)).

4. Petitioners appealed the contempt order, arguing that it should be set aside because the district court lacks jurisdiction over the underlying action due to the plaintiffs' lack of standing. A divided panel of the court of appeals affirmed (Pet. App. 1a-43a). The majority held that petitioners, as non-party witnesses, "may challenge their contempt adjudication only on the limited ground that the District Court lacks even colorable jurisdiction over the underlying lawsuit" (*id.* at 18a), but may not seek to have the contempt order expunged by bringing "a full-scale challenge to the correctness of the district court's exercise of such jurisdiction" (*id.* at 10a). Applying that limited standard of review, the majority concluded that the trial court's assumption of jurisdiction rests on a sufficient basis to support the contempt judgment. The majority stated that the plaintiffs' suit "is more than a citizen effort to have the tax laws enforced and more than a taxpayer effort to complain of tax exemptions of others that might violate the Establishment Clause" (*id.* at 19a). Rather, the majority concluded, the plaintiffs have asserted "at least a colorable basis" (*id.* at 20a) on which to predicate standing by "claim[ing] direct, personal injury arising from the fact that the federal defendants' failure to enforce the political

action limitations of section 501(c)(3) has placed the plaintiffs at a competitive disadvantage with the Catholic Church in the arena of public advocacy on important public issues" (*id.* at 19a).

Judge Cardamone dissented, stating that the court should have decided whether the district court's assumption of jurisdiction over the suit was correct, not merely whether it was "colorable" (Pet. App. 21a-41a). The dissent stated that, if the petitioners were correct that there was no standing, then the majority's ruling had the effect of forcing them to comply with an order of the district court that "exceeded the jurisdictional limits of Article III" (*id.* at 29a). Moreover, the dissent continued (*id.* at 33a), "[t]o emasculate the witnesses' right to appeal by so narrow a view of what an appellate court may review, effectively deprives these contemnors of any meaningful appeal."

SUMMARY OF ARGUMENT

A. It is well established that a witness who is held in civil contempt for failure to comply with an order is entitled to have the contempt judgment set aside on appeal if the lower court lacked jurisdiction to enter the order that led to the contempt. If the plaintiffs here lack standing to bring this suit challenging the tax exemption of a third party, then the district court lacks subject matter jurisdiction over the suit, and it follows that enforcement of a discovery order in furtherance of the suit exceeded the court's jurisdiction. In conformity with the general rule that an appellate court is always obliged to consider the existence of subject matter jurisdiction in the lower court, the court of appeals should have resolved on petitioners' appeal whether the plaintiffs had standing.

The court of appeals erred in holding that its review of the jurisdictional issue must be limited to considering whether the plaintiffs lacked a "colorable basis" for standing. That holding forces petitioners to comply with an extremely burdensome discovery order, even if they can establish that the district court exceeded its Article

III jurisdiction in enforcing the order. As a practical matter, therefore, the court's holding renders petitioners' right to appeal meaningless.

The court of appeals' decision cannot be squared with this Court's decision in *United States v. United Mine Workers*, 330 U.S. 258, 289-295 (1947). It is true that a court ultimately held not to have jurisdiction may still have acted properly in exercising judicial power to the extent necessary to determine its jurisdiction, but that principle has no application here because it does not authorize a court to enforce a discovery order directed at the merits of a lawsuit over which the court has no subject matter jurisdiction. Moreover, while the rule is different for criminal contempt, a civil contempt sanction such as the one at issue here, whose purpose is to coerce compliance with the court's order for the benefit of particular litigants, must fall when it is determined that the court's order exceeded its jurisdiction. See *id.* at 294-295. Therefore, the court of appeals was obliged to consider whether the district court's ruling on standing was correct, not merely whether that ruling had a "colorable basis," and to set aside the contempt judgment if it concluded that the plaintiffs lacked standing.

B. The plaintiffs' contention that they have standing to bring this lawsuit against the federal defendants—on the ground that they have suffered a concrete injury directly traceable to the government's failure to revoke the tax exemption of the Catholic Church—is foreclosed by recent decisions of this Court. The claim that the plaintiffs who are clergy members have "Establishment Clause standing" because they are "denigrated" by allegedly favorable treatment of another religious group does not allege a judicially cognizable injury. The plaintiffs' ability to teach and minister to their congregations is not affected by the Church's tax exemption; thus, the only injury they allege is that the perception of favorable treatment of the Church "demeans" them and makes them feel like "second class citizens" (see, *e.g.*, J.A. 46, 49). This sort of "denigration" claim can be made by virtually any litigant who alleges that he is discomfited

by some government action that does not directly affect him. This Court has consistently rejected such a basis for standing, whether couched as "stigmatic" injury (*Allen v. Wright*, 468 U.S. 737, 753-756 (1984)), or "psychological" distress (*Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982)).

The plaintiffs' claim of "voter standing" does not allege an injury that is properly traceable to the challenged government action and thus does not confer standing to sue the federal defendants. The allegation that the plaintiffs suffer a "competitive disadvantage" (see J.A. 15) in the political arena as a result of the Church's exemption does not, standing alone, allege a concrete injury; indeed, any participant in the political process could make a similar complaint about the tax treatment of any other participant. A concrete injury in the political arena requires some direct effect on electoral results or legislative decisions in which the plaintiffs have an interest. It is entirely speculative whether the relief requested here would redress any palpable injury suffered by the plaintiffs and, indeed, whether the plaintiffs have suffered any such injury at the hands of the federal defendants. It is unknown whether a change in the Church's tax status would result in any changes in its resources or activities. And, even if it did, it is uncertain whether those changes would have any effect on the success of the candidates and causes that the plaintiffs support, which ultimately turns on the decisions of numerous individual voters. In short, the injury alleged by the plaintiffs cannot be remedied by the federal defendants; the improvement of their political position depends largely on the "independent action of * * * third part[ies] not before the court" (*Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42 (1976)). The causal connection between the Church's tax exemption and any judicially cognizable injury to the plaintiffs is too tenuous to support standing. See also *Allen v. Wright*, 468 U.S. at 758-759.

The plaintiffs' claimed status as "voters" does not alter this result. Their standing contention cannot be ana-

logized to *Baker v. Carr*, 369 U.S. 186 (1962), because they do not challenge any aspect of the electoral process. Rather, the gravamen of their claim is one of "competitor standing," in which the political arena happens to be the area in which they "compete" with the Catholic Church. Viewed in this light, it is again apparent that the plaintiffs lack standing because they can point to no "injury in fact" sustained as a consequence of the conduct of the federal defendants. The only injury alleged is that the Church's tax exemption gives it a financial advantage that automatically handicaps or injures its competitors, such as the plaintiffs. This theoretical injury cannot possibly satisfy the "concrete injury" limitation of Article III; if it did, any businessman could sue to challenge any government action that redounded to the financial benefit of his competitor.

The district court's decision upholding standing clashes with the basic separation of powers principles that underlie Article III. The plaintiffs seek to interfere with the Executive Branch's enforcement responsibilities by having the court compel the government to undertake a nationwide review of the activities of a particular tax-exempt organization. But it is not the province of the courts to "monitor the wisdom and soundness of Executive action" such as enforcement decisions (*Laird v. Tatum*, 408 U.S. 1, 15 (1972)). This principle has special force where, as here, the claim intrudes into the detailed structure that Congress has erected to govern tax enforcement. Indeed, any judgment the plaintiffs could secure in this suit against federal tax officials would not bind the petitioners, who are not parties to the underlying suit. It would merely serve as a catalyst for further litigation to determine petitioners' tax status. For similar reasons, prudential considerations strongly militate against upholding the standing of these plaintiffs. They are seeking to vindicate not their own legal rights, but rather that of the government to collect taxes, and their concern about tax law enforcement is "more appropriately addressed in the representative branches" (*Allen v. Wright*, 468 U.S. at 751).

ARGUMENT

THE DISTRICT COURT'S ORDER HOLDING PETITIONERS IN CONTEMPT SHOULD BE SET ASIDE FOR LACK OF JURISDICTION BECAUSE THE PLAINTIFFS DO NOT HAVE STANDING TO BRING THE UNDERLYING LAWSUIT

The court of appeals erred in two respects in upholding the contempt order entered against petitioners in this case. First, the court was mistaken in holding that a witness held in civil contempt for failure to comply with a discovery order can appeal that order on jurisdictional grounds only to the limited extent of asking an appellate court to find that the court issuing the order lacks even "colorable" jurisdiction over the underlying lawsuit. The consequence of this holding is that a witness has no realistic option but to comply with a discovery order of a court that lacks jurisdiction to issue that order; the witness's right to appeal from the contempt order is illusory because the court of appeals will not intervene on the witness's behalf even if it believes that the district court lacks Article III jurisdiction as a matter of law.

Second, the plaintiffs here manifestly lack standing to bring this action, and thus, even under the unduly narrow standard of review adopted by the court of appeals, the court erred in finding that the district court had a "colorable" basis for jurisdiction. The plaintiffs seek to force the government to revoke the tax exemption of an unrelated taxpayer on the ground that that taxpayer has not complied with the statutory conditions for retaining that exemption. Whether grounded in the concern of clergymen about First Amendment issues or in the assertion of other plaintiffs that their favored political candidates are disadvantaged, the plaintiffs' objections boil down to a complaint that the government is not properly enforcing the law. Such an attempt to enlist the Judicial Branch to interfere with the government's determinations respecting third persons, however, is not cognizable by the federal courts because the plaintiffs are not seeking to redress the type of concrete injury that creates a

"case or controversy" under Article III. The plaintiffs lack standing here as a matter of law, and it is a misuse of the judicial process to have this case continue through burdensome discovery and a trial when it is apparent that this lawsuit lacks the basic constitutional prerequisites to invocation of federal court jurisdiction.

A. The Contempt Order Entered Against The Petitioners Should Be Set Aside If The Plaintiffs Lack Standing To Bring The Underlying Lawsuit Against The Federal Respondents

1. Petitioners were held in contempt by the district court for failing to comply with a discovery order issued in a lawsuit to which they are not parties—namely, a suit brought by the plaintiffs against the federal respondents to force them to revoke petitioners' tax exemption. As the court of appeals acknowledged (Pet. App. 8a), there is no doubt that petitioners are entitled to take an immediate appeal from that contempt order, even though no final judgment has been entered in the underlying lawsuit. Once sanctions are imposed upon a witness for failure to comply with a subpoena or other discovery order, "the matter becomes personal to the witness and a judgment as to him" (*Alexander v. United States*, 201 U.S. 117, 122 (1906)), and denial of the right to appeal at that time "would forever preclude review of the witness' claim, for his alternatives are to abandon the claim or languish in jail" (*Cobbledick v. United States*, 309 U.S. 323, 328 (1940)). Accordingly, he may obtain appellate review of the contempt judgment "before undertaking any burden of compliance with the subpoena" (*United States v. Ryan*, 402 U.S. 530, 533 (1971)).

It is well established that an appellate court is obliged to consider, as a threshold question, the existence of subject matter jurisdiction, both of the appellate court itself and of the lower court. *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986). When a lower court lacks subject matter jurisdiction, the appellate court is bound to notice that defect even if it is not raised by

the parties; in that event, it has “jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit” (*ibid.*, quoting *United States v. Corrick*, 298 U.S. 435, 440 (1936)). And such subject matter jurisdiction, of course, is lacking if the “case or controversy” requirement of Article III, including the requirement that the plaintiffs have standing, is not satisfied. *Bender v. Williamsport Area School District*, 475 U.S. at 541-542.

It also has long been recognized that a contempt judgment may be attacked on appeal on the ground that the court that entered it lacked subject matter jurisdiction over the underlying action and hence lacked authority to enter the order that gave rise to the contempt. Thus, in *Ex parte Fisk*, 113 U.S. 713 (1885), this Court overturned on that basis a contempt judgment that had been entered against the defendant for failing to submit to a pretrial examination. The Court stated (*id.* at 718):

When * * * a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void.

Similarly, in *In re Sawyer*, 124 U.S. 200 (1888), the Court explained in overturning a contempt judgment that “[t]he Circuit Court being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of the jurisdiction which it assumed are null and void” (*id.* at 221). See also *In re Green*, 369 U.S. 689 (1962); *United States v. United Mine Workers*, 330 U.S. 258, 289-295 (1947); *Ex parte Rowland*, 104 U.S. 604, 612 (1881).

Relying upon these principles, petitioners took an appeal from the district court’s order holding them in contempt and argued that the order should be set aside for lack of subject matter jurisdiction because the plaintiffs lacked Article III standing to sue the federal defendants. If a district court is disabled from reaching the merits of

a controversy for lack of subject matter jurisdiction, it follows that it may not enforce discovery orders issued in connection with the merits of that suit. In the words of this Court, “[t]hose who do not possess Art. III standing may not litigate as suitors in the courts of the United States” (*Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.* (*Valley Forge*), 454 U.S. 464, 475-476 (1982)). This constitutional prohibition bars such litigants from invoking the process of the federal courts to obtain papers or testimony from their opponents or other persons. See also *United States v. Morton Salt Co.*, 338 U.S. 632, 641-642 (1950). Thus, if the plaintiffs here lacked standing to bring the underlying lawsuit, the district court lacked jurisdiction to enforce a discovery order at their behest, and the judgment holding petitioners in contempt for failing to comply with that order should be set aside on appeal.

2. While the court of appeals expressed agreement with many of the principles discussed above, it declined to decide whether the plaintiffs had standing, and therefore it refused to set aside the contempt judgment. The court of appeals agreed that petitioners could appeal the contempt order (Pet. App. 8a) and that an appellate court is obliged to consider the question of the lower court’s jurisdiction (*id.* at 16a), and it did not dispute that a witness should not be held in contempt for failing to comply with a discovery order that exceeds the court’s jurisdiction. Indeed, the court acknowledged that it would have agreed with petitioners that they could challenge the plaintiffs’ standing on a contempt appeal, except that it disagreed with one basic premise of petitioners’ challenge—namely, that the district court was precluded from ordering and enforcing discovery if it lacked subject matter jurisdiction over the underlying lawsuit (*id.* at 12a). To the contrary, the court stated, the district court could still exercise judicial power, including the power to compel discovery, even if it lacked subject matter jurisdiction (*id.* at 12a-13a). The court concluded that the contempt order could be set aside only

if the district court lacked even a “colorable basis” for exercising subject matter jurisdiction (*id.* at 18a-20a).

The result reached by the court of appeals is anomalous. The court recognized that the question of the plaintiffs’ standing is a “substantial” one (Pet. App. 19a), and that question undoubtedly is a legal one that the court of appeals could have resolved. But the court nevertheless determined that it must close its eyes to that legal question, with the consequence that the petitioners are left with no alternative but to comply with burdensome discovery in a lawsuit in which it is likely that the court lacks subject matter jurisdiction. Moreover, as the dissent pointed out (Pet. App. 38a-39a), the “colorable basis” standard established by the majority to govern review on appeal does not appear to provide any greater discipline to prevent a district court from exceeding its jurisdiction than does the narrow standard for the availability of mandamus. Accordingly, at least in this context, the well-established right to appeal from a contempt judgment would be rendered meaningless as a practical matter (see *id.* at 32a-34a).

In our view, the court erred in fashioning this severe limitation on the right to appeal a contempt judgment that exceeds the district court’s jurisdiction. A correct interpretation of the decisions of this Court relied upon by the court of appeals demonstrates that there is no obstacle to consideration of the lower court’s subject matter jurisdiction on an appeal from a judgment of civil contempt entered to enforce compliance with a discovery order.

3. The court of appeals appears to have derived its “colorable basis” standard from this Court’s decision in *United States v. United Mine Workers, supra*. In that case, the United States, which had taken over operation of most of the country’s coal mines, sought declaratory and injunctive relief in federal district court against a strike threatened by the union. The union claimed that the Norris-LaGuardia Act, 29 U.S.C. 101, deprived the court of jurisdiction to enjoin a strike. The district court

issued a temporary restraining order against a strike, while it considered the Norris-LaGuardia issue. The union and its president disobeyed the temporary restraining order, and they were held in criminal and civil contempt and fined. On appeal, the contemnors argued that, because of the Norris-LaGuardia Act, the district court lacked subject matter jurisdiction to enter the temporary restraining order that led to the contempt.

This Court upheld the contempt judgments, finding that the Norris-LaGuardia Act was not applicable (see 330 U.S. at 269-289). Of particular relevance here, however, is this Court’s discussion of the “alternative grounds which support the power of the District Court to punish violations of its orders as criminal contempt” (*id.* at 289)—what the court of appeals below termed a court’s “jurisdiction to determine its jurisdiction” (Pet. App. 13a). This Court explained that, even if it had ultimately concluded that the Norris-LaGuardia Act divested the district court of jurisdiction, “the District Court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief” (330 U.S. at 293).⁵ Accordingly, unless “the question of jurisdiction [were] frivolous and not

⁵ This principle is well established, and we do not dispute that a court may issue and enforce orders aimed at determining whether the court has subject matter jurisdiction. See also *United States v. Shipp*, 203 U.S. 563, 573 (1906)). Thus, we do not take issue with Judge Kearsse’s observation in her concurring opinion (Pet. App. 42a-43a) that a trial court may have the power to permit some discovery in order to allow the court to determine whether standing exists. But Judge Kearsse’s observation has no relevance to the instant case. The discovery order that forms the predicate for the contempt judgment was indisputably directed at the merits of the litigation. For purposes of the standing inquiry, the district court correctly accepted the allegations in the plaintiffs’ complaint as true, and no one suggested that discovery was needed to illuminate the standing inquiry. Indeed, the district court had already unequivocally held, on two separate occasions, that the plaintiffs have standing to bring the underlying lawsuit. Thus, the order underlying the contempt judgment plainly cannot be justified as “discovery relating to standing” (*id.* at 43a).

substantial" (*ibid.*), the issuance of the temporary restraining order would still have been a lawful exercise of the court's power, and the judgment of criminal contempt would not have been set aside.

In the course of this discussion, however, the Court was careful to distinguish between civil and criminal contempt (330 U.S. at 294-295 (footnote omitted)):

It does not follow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order. The right to remedial relief falls with an injunction which events prove was erroneously issued, * * * and *a fortiori* when the injunction or restraining order was beyond the jurisdiction of the court.

The Court therefore concluded that, "[i]f the Norris-LaGuardia Act were applicable in this case, the conviction for civil contempt would be reversed in its entirety" (*id.* at 295).

Thus, far from supporting the court of appeals' holding here, this Court's opinion in *United Mine Workers* directly contradicts it. In concluding the contrary—that *United Mine Workers* indicates that it could not inquire into the jurisdiction of the lower court other than to determine whether there existed a "colorable basis" for jurisdiction—the court of appeals reasoned that *United Mine Workers* showed that "[a] lack of subject matter jurisdiction does not disable a district court from exercising all judicial power" because it may inquire into its own jurisdiction (Pet. App. 12a). The court further reasoned that this power would extend to "[c]ompelling a recalcitrant witness to furnish unprivileged evidence," and that, in order to preserve "the orderly processes of the courts," such an order must be obeyed upon pain of criminal contempt, even if it is subsequently determined by an appellate court that the trial court lacks jurisdiction (*id.* at 13a). The court then concluded that there is

no basis for distinguishing between civil and criminal contempt for these purposes and therefore that a civil contempt sanction should also be upheld, irrespective of whether it is ultimately determined that the trial court lacked jurisdiction over the lawsuit (*id.* at 13a-15a).

As the dissent cogently explains (Pet. App. 36a-38a), the majority's analysis is flawed in two major respects. First, the *United Mine Workers* principle that a court must be able to exercise some power in order to determine its jurisdiction—and that the use of that power is enforceable by criminal contempt—does not mean that there are no limits on what a court without jurisdiction can do. In particular, a court is not empowered to issue discovery orders going to the merits of a case over which it lacks jurisdiction.

Second, the majority erred in failing to recognize that civil contempt cannot be equated with criminal contempt for these purposes. Criminal contempt sanctions are imposed "to vindicate the authority of the court" (*Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911)). When someone flouts that authority—for example, by "disrupt[ing] the courtroom" (Pet. App. 13a)—his conduct is punishable as an act of criminal contempt, and there is no reason why he should go unpunished simply because it turns out that the court lacked subject matter jurisdiction over the case in which the disruption occurred. By contrast, civil contempt "is remedial, and for the benefit of the complainant" (*Gompers v. Bucks Stove & Range Co.*, 221 U.S. at 441). The "ultimate object" of civil contempt is "the enforcement of the rights and remedies of a litigant" (11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2960, at 584 (1973)).⁶ Therefore, when it is determined that there is

⁶ This crucial distinction is reflected in this case where the objective of the civil contempt judgment against petitioners, which imposed sanctions only until they complied with the discovery order (see Pet. App. 50a-51a), clearly was to coerce compliance with that order for the benefit of the plaintiffs, not to vindicate the authority of the court. Thus, this case does not present issues comparable to those currently pending before the Court in *United States v.*

no jurisdiction over the underlying lawsuit, the basis for the civil contempt judgment disappears, and there is no reason to enforce it.

That is precisely the conclusion this Court reached in *United Mine Workers*, where it stated that "[t]he right to remedial relief [in the form of civil contempt sanctions] falls with an injunction which events prove * * * was beyond the jurisdiction of the court" (330 U.S. at 295). The Court's ultimate conclusion that, if the district court had lacked jurisdiction to enter the restraining order, "the conviction for civil contempt [for failing to comply with that order] would be reversed in its entirety" (*ibid.*) is fully applicable here.⁷ That conclusion requires that the contempt judgment against petitioners be set aside if the district court did not have jurisdiction to enforce the discovery order because of the plaintiffs' lack of standing, and therefore the court of appeals erred in sustaining the contempt judgment on a mere showing of a "colorable basis" for standing.⁸

Providence Journal Co., No. 87-65 (argued Jan. 20, 1988), where the respondent was held in criminal contempt for publishing a newspaper article in defiance of a temporary restraining order that respondent had not endeavored to challenge through the judicial process.

⁷ If the court of appeals' analysis of the scope of review of civil contempt judgments on appeal were correct, this Court in *United Mine Workers*, in order to sustain even the civil contempt judgment in that case, would have needed to decide no more than that the district court had a "colorable basis" for issuing the restraining order. The extensive consideration that the Court gave to the question whether the district court actually had jurisdiction (see 330 U.S. at 269-289; *id.* at 312-328 (Frankfurter, J., concurring); *id.* at 343-351 (Rutledge, J., dissenting)) graphically demonstrates that the decision below cannot be squared with *United Mine Workers*.

⁸ Indeed, the fact that the petitioners claim that the district court's exercise of jurisdiction here is barred, not merely by statute as in *United Mine Workers*, but by Article III, and thus exceeds the constitutional power of the federal courts, makes the court of appeals' failure to resolve that jurisdictional question even more inappropriate.

4. The court of appeals also relied heavily on this Court's decision in *Blair v. United States*, 250 U.S. 273 (1919), to justify its refusal to determine whether the district court had jurisdiction. In *Blair*, several witnesses were held in civil contempt for refusing to testify before a grand jury that was investigating violations of the federal election laws. Stating that a witness "is not interested to challenge the jurisdiction of court or grand jury over the subject-matter that is under inquiry," the Court held that the witnesses could not challenge the contempt judgment on the ground that the election laws were unconstitutional and hence the grand jury lacked "jurisdiction" to conduct its investigation (see *id.* at 279). The court of appeals below held that *Blair* was not restricted to the grand jury context, but rather "was intended to state a rule of wider application"—namely, that any witness, even in a civil case, who has been held in contempt can challenge only "whether there exists a colorable basis for exercising subject matter jurisdiction," but may not mount "a full-scale challenge to the correctness of the district court's exercise of such jurisdiction" (Pet. App. 10a).

There are, however, two fundamental distinctions between the issue in *Blair* and the question presented here. First, as the dissent explains (Pet. App. 34a-36a), the rationale of *Blair* was addressed to the grand jury context in which it arose, and that decision does not control here where the witness challenges the Article III jurisdiction of the court over the lawsuit that underlies the contempt sanction. The power of the district court to enforce the discovery order issued in this case was derivative from its jurisdiction over the underlying lawsuit, and therefore depended upon satisfaction of the requirements of Article III. But a grand jury "does not depend on a case or controversy for power to get evidence." *United States v. Powell*, 379 U.S. 48, 57 (1964). See also *United States v. Bisceglia*, 420 U.S. 141, 148 (1975). Rather, the grand jury is an investigative body whose inquiries may be wide-ranging. Thus, as the dissent ex-

plained, "the jurisdiction of the grand jury is not dependent upon the constitutionality of the statutes which prohibit the conduct being investigated" (Pet. App. 34a). Hence, "a declaration that the statute in *Blair* was unconstitutional would not [have given] the witness the relief he sought," and therefore he was "not interested" to challenge the validity of that statute on his contempt appeal (Pet. App. 34a).

Indeed, the opinion in *Blair* reflects this Court's reliance on the special nature of the grand jury. See, e.g., *United States v. Calandra*, 414 U.S. 338, 349-350 (1974). The Court in *Blair* noted that a grand jury investigation is not "preceded by a formal charge" (250 U.S. at 282). The scope of its inquiries is not "limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime" (*ibid.*). In contrast to a lawsuit, where the nature of the dispute is framed at the outset by the complaint, "the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning" (*ibid.*). Therefore, a challenge to the subject matter of the grand jury's investigation cannot reasonably be made before the investigation is concluded; the grand jury at least has "jurisdiction to investigate the facts in order to determine the question whether the facts show a case within [its] jurisdiction" (*id.* at 283). By contrast, the district court's jurisdiction over the lawsuit here can be assessed at the outset of the litigation simply by examining the complaint.

Moreover, *Blair* is not controlling here for another, independent reason. In seeking to challenge the substantive power of Congress to enact the statute that was the subject of the grand jury investigation in *Blair*, the witnesses were asserting a contention about what in a later prosecution would become part of the merits of the case, rather than a challenge to the power of the federal courts under Article III to decide the merits (including the

question of the statute's constitutionality). Hence, we submit that even a witness called to testify at a trial could not justify refusal to do so on the grounds asserted by the grand jury witnesses in *Blair*.

In short, neither *Blair* nor any other decision of this Court supports the court of appeals' holding here. On the contrary, under this Court's jurisprudence, the district court's lack of Article III jurisdiction over the underlying lawsuit means that the court did not have the power to compel petitioners to comply with the plaintiffs' discovery request, and that the petitioners should not be compelled to submit to the district court's discovery orders without an opportunity on appeal to challenge the court's jurisdiction. Thus, the court of appeals erred in limiting its inquiry to whether the district court's jurisdiction was "colorable;" it should have determined whether the district court in fact has jurisdiction over the underlying lawsuit.

B. The Plaintiffs Lack Standing To Challenge Petitioners' Tax Exemption

The district court's holding that the plaintiffs have standing to sue to revoke the tax exemption of the Roman Catholic Church cannot be reconciled with established principles governing standing. The theories of "Establishment Clause standing" or "voter standing" recognized by the district court plainly do not allege a sufficiently concrete and redressable personal injury to satisfy the strictures of Article III. On the contrary, these allegations of injury do not materially distinguish the plaintiffs from any citizen who seeks to "have the Government act in accordance with law" (*Allen v. Wright*, 468 U.S. 737, 754 (1984)). That type of challenge is not cognizable in federal court. Indeed, the district court's holding that the plaintiffs have standing so clearly contravenes principles well established by this Court that it cannot reasonably be maintained that the complaint in this case establishes even a "colorable" basis for standing. Accordingly, even under the unduly narrow standard of

review adopted by the court of appeals, that court erred in failing to set aside for lack of jurisdiction the order holding petitioners in contempt.

1. A Plaintiff Lacks Standing To Maintain A Suit Challenging Governmental Action Directed At An Unrelated Party Unless He Alleges That He Has Personally Suffered A Concrete Injury That Is Fairly Traceable To The Government's Challenged Conduct And That Is Redressable By The Requested Relief

The basic principles that govern the question whether a plaintiff has standing to maintain a lawsuit in federal court are well established. A plaintiff must "allege[] such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf" (*Warth v. Seldin*, 422 U.S. 490, 498-499 (1975) (emphasis in original), quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). The "core component" of standing, derived directly from the "cases" or "controversies" requirement of Article III of the Constitution, requires the plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief" (*Allen v. Wright*, 468 U.S. at 751). That injury cannot be an "abstract" one (*O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)); it must be "'distinct and palpable'" (*Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (citation omitted)). The Court has explained that these requirements arise out of a "single basic idea—the idea of separation of powers" (*Allen v. Wright*, 468 U.S. at 752)—in that they demarcate fundamental limits on the role of the federal courts in our tripartite system of government.

In addition to these constitutional requirements, this Court has also recognized that the standing doctrine embraces certain prudential limitations on the exercise of federal jurisdiction, including "the rule barring adjudication of generalized grievances more appropriately addressed in

the representative branches" (*Allen v. Wright*, 468 U.S. at 751). The Court has summarized this aspect of the standing inquiry as "[e]ssentially, * * * whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief" (*Warth v. Seldin*, 422 U.S. at 500 (footnote omitted)). In short, a federal court "'is not the proper forum to press' general complaints about the way in which government goes about its business" (*Allen v. Wright*, 468 U.S. at 760, quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983)).

On several occasions in recent years, the Court has reaffirmed these basic standing principles and emphasized that their effect is generally to deny access to the federal courts by plaintiffs who seek to litigate the claim that the government is failing to enforce its laws—in particular, laws relating to tax exemptions—against a third party. Most recently, in *Allen v. Wright*, *supra*, the Court held that the parents of black public school children lacked standing to challenge the tax-exempt status of allegedly discriminatory private schools. The Court explained that the plaintiffs' complaint that the government was not adequately enforcing the tax exemption laws could not alone give rise to standing: "'[a]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning'" (468 U.S. at 754 (quoting *Valley Forge*, 454 U.S. at 483)).

The Court further held that the plaintiffs' claim that blacks suffered "a stigmatic injury, or denigration" (468 U.S. at 754), as a result of discriminatory government conduct (namely, recognition of tax exemptions for segregated schools) alleged no concrete personal injury that could give rise to standing. The claim of denigration was too abstract to be judicially cognizable; rather, such an injury could confer standing only if the stigma were allegedly suffered "as a direct result of having personally

been denied equal treatment" (*id.* at 755). Otherwise, the Court explained, "standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption" (*id.* at 755-756). The Court also rejected the plaintiffs' attempt to base standing on the assertion that granting the tax exemptions to the private schools "diminished [their children's] ability to receive an education in a racially integrated school" (*id.* at 756). The Court held that the line of causation between the government's enforcement of the tax laws and public school desegregation was too weak; it was mere speculation whether the withdrawal of tax exemptions would affect the racial balance in the public schools attended by the plaintiffs' children (*id.* at 758).

In *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), this Court also found no standing to litigate whether the government was properly enforcing the tax laws against other persons. A group of indigent plaintiffs had sued Treasury officials to challenge a Revenue Ruling that allowed nonprofit hospitals to qualify for tax exemption under Section 501(c)(3) even if they provided indigents with no more than emergency room services. This Court held that the plaintiffs' allegations of injury in the form of the denial of services by these hospitals did not confer standing because it was "purely speculative" whether the alleged injury could fairly be traced to the government's tax enforcement action "or instead result[s] from decisions made by the hospitals without regard to the tax implications" (426 U.S. at 42-43). And in *Valley Forge*, the Court held that the plaintiffs lacked standing to challenge the conveyance of surplus federal property to a sectarian institution because they "fail[ed] to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees" (454 U.S. at

485 (emphasis in original)). The allegations of personal injury in the instant case are not materially different from the allegations in these decisions of this Court, and it follows that here also the plaintiffs lack standing to challenge the tax exemption of an unrelated party.

2. *The Plaintiffs' Allegation That They Are Denigrated By The Conferral Of A Tax Exemption Upon The Catholic Church Does Not Assert An Injury That Is Cognizable In Federal Court*

The district court has held that the plaintiff members of the clergy, who hold and teach religiously-inspired pro-abortion views, have "Establishment Clause standing" because they are "denigrated" by the grant of a tax exemption to the Catholic Church, which the court viewed as "government endorsement of a theology contrary to [the plaintiffs'] guiding principles" (see Pet. App. 68a).⁹ The court found that this alleged denigration causes a "discrete spiritual injury" to these plaintiffs because it "diminishes their position in the community, encumbers their calling in life, and obstructs their ability to communicate effectively their religious message" (*ibid.*). The court added that "[t]he granting of a uniquely favored tax status to one religious entity is an unequivocal statement of preference that gilds the image of that religion and tarnishes all others" (*id.* at 69a).

This asserted "denigration" injury is indistinguishable from the "stigmatic" injury alleged in *Allen* and held by

⁹ This injury is not actually alleged in the complaint, but was derived by the district court from affidavits filed by various of the clergy plaintiffs. They averred that the exemption "offends," "demeans," and "denigrates" them and their religious values (J.A. 44, 45, 46, 52, 54), making them feel like "second class citizens" (J.A. 49) whose beliefs are less "worthy of attention" (J.A. 44) than those of the Catholic Church. The court also found that the Women's Center for Reproductive Health had "Establishment Clause standing" because it provides counseling on abortion and family planning and is affiliated with the Presbyterian Church (Pet. App. 68a-69a; see J.A. 53-55).

this Court not to constitute a judicially cognizable injury.¹⁰ In *Allen*, the plaintiffs claimed that granting tax exemptions to schools “‘that treat members of their race as persons of lesser worth’” (468 U.S. at 749 (citation omitted)), denigrated the members of the race that had been discriminated against (*id.* at 752); here, the district court held that granting a tax exemption to one religious entity “tarnishes all other[] [religions]” (Pet. App. 69a). In neither case, however, is there alleged any injury that is “suffered as a direct result of having personally been denied equal treatment” by the federal defendants (468 U.S. at 755). The plaintiffs’ ability to minister to their congregations or to teach them that their religion “command[s] consideration of abortion as the morally required response to pregnancy” (Pet. App. 68a (footnote omitted)) is not affected by the grant of a tax exemption to the Catholic Church and would not be enhanced by the relief the plaintiffs seek.¹¹

The district court’s statement that the stigma allegedly incurred by the clergy plaintiffs “diminishes their position in the community, [and] encumbers their calling in life” (Pet. App. 68a) does not describe a judicially cognizable injury. The black plaintiffs in *Allen* made essentially the same claim—loss of status in the community and on the job are a large part of what it means to be “denigrated.” If this type of allegation were sufficient to

¹⁰ Indeed, the result here follows *a fortiori* from that case. At least the private schools in *Allen* (although not the defendant federal officials) allegedly discriminated against black children. By contrast, petitioners—the third parties here—are not alleged to have performed acts directed against the plaintiffs, but at most to have expressed personal views and engaged in political advocacy on subjects also of interest to the plaintiffs.

¹¹ The plaintiffs do not assert that they or their organizations have been denied a tax exemption. Moreover, their affidavits indicate their belief that their religious institutions would not be entitled to a tax exemption if they were to engage in the type of political activity that the complaint attributes to the Catholic Church. See, *e.g.*, J.A. 43, 45, 52, 54.

confer standing, virtually any litigant could challenge any government action that he views as unduly favorable to someone else simply by alleging what cannot be disproved—namely, that he suffers denigration, stigma, or like form of discomfiture as a result of the challenged action. Standing would then require little, if anything, more than the mere motivation to bring suit.

Moreover, while the clergy plaintiffs, because of their profession, may be particularly sensitive to a perceived unequal treatment of religion, that fact does not separate them from their co-religionists for standing purposes; “standing is not measured by the intensity of the litigant’s interest or the fervor of his advocacy” (*Valley Forge*, 454 U.S. at 486). See also *Diamond v. Charles*, No. 84-1379 (Apr. 30, 1986), slip op. 11 (physician cannot establish standing to challenge government failure to enforce laws against other physicians by “cloak[ing his claim] in the nomenclature of a special professional interest”). Indeed, the present case, no less than *Allen*, illustrates why recognition of “denigration” as a judicially cognizable injury would profoundly subvert the limitations of Article III. In *Allen*, the Court hypothesized that the plaintiffs’ theory could enable a “black person in Hawaii [to] challenge the grant of a tax exemption to a racially discriminatory school in Maine” (468 U.S. at 756). Here, that hypothetical comes to life; clergy from Florida (J.A. 53) and New York (*e.g.*, J.A. 43, 45) are urging the court to scrutinize the conduct of Catholic priests in Texas and South Dakota (J.A. 12). In short, while the clergy plaintiffs and other non-Catholics may well feel denigrated by what they perceive as unduly favorable government treatment of another religious group, that feeling is not the sort of concrete and palpable injury that is an Article III prerequisite to invocation of the jurisdiction of the federal courts.¹²

¹² There is no warrant for departing from these basic standing principles simply because the alleged injury is a “spiritual” one based on a claim of an Establishment Clause violation. In *Abington School District v. Schempp*, 374 U.S. 203 (1963), an Establishment

Indeed, the denigration claim is closely analogous to the standing claim rejected by this Court in *Valley Forge*. There, plaintiffs with strongly held views about separation of church and state challenged a government transfer of property to a religious institution, relying upon a “shared individuated right to a government that ‘shall make no law respecting the establishment of religion’ ” (454 U.S. at 482 (citations omitted)). This Court held that the plaintiffs lacked standing, however, because they failed to identify “any personal injury suffered by them *as a consequence* of the alleged constitutional error”; their “psychological” distress at government action, even if “phrased in constitutional terms,” established no basis for standing (*id.* at 485-486 (emphasis in original)). The plaintiffs here similarly base their “Establishment Clause standing” claim essentially on “psychological” distress caused by government action that they view as favoring another religious entity; this type of generalized, abstract injury is not judicially cognizable.

Clause challenge to Bible reading in the public schools, this Court observed that “[i]t goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain” (*id.* at 224 n.9). The Court concluded that there was standing because the plaintiffs—students in the schools—were “directly affected by the laws and practices against which their complaints [were] directed” (*ibid.*). The Court specifically contrasted the standing of the plaintiffs there with *Doremus v. Board of Education*, 342 U.S. 429 (1952), where the Court had concluded that the plaintiffs lacked standing to raise the same substantive issue. As this Court recently observed, “[t]he plaintiffs in *Schempp* had standing, not because their complaint rested on the Establishment Clause—for as *Doremus* demonstrated, that is insufficient—but because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them” (*Valley Forge*, 454 U.S. at 487 n.22). The clergy plaintiffs here are hardly in a position to allege a comparable element of personal injury.

3. *The Plaintiffs’ Allegation That The Catholic Church’s Tax Exemption Gives Opponents Of Abortion An Unfair Advantage Over Them In The Political Process Does Not Provide A Basis For Standing Because It States No Injury Fairly Traceable To The Federal Defendants Or Redressable By The Requested Relief*

a. The district court also held that the plaintiffs had established what it called “voter standing” based on their alleged status as “voters” participating “in the public debate on abortion” (J.A. 15, 17). The complaint alleged that the Catholic Church had “attracted and used tax-exempt, tax-deductible dollars to elect candidates sympathetic to its position, whereas the plaintiffs cannot and have not done so,” thereby enabling the Church to obtain a “financial and political advantages” (J.A. 15). The complaint concluded that the tax exemption injured the plaintiffs because “[i]n the inherently competitive political arena an advantage granted to one competitor automatically constitutes a handicap to the others” (*ibid.*). Relying on *Baker v. Carr*, 369 U.S. 186 (1962), the district court held that these allegations established “voter standing” to challenge “alleged government action which has improperly biased the political process against the discrete group to which they belong” (Pet. App. 72a). The court of appeals in turn relied entirely on this theory to support its finding that the plaintiffs had made a “colorable” claim of standing, stating that the plaintiffs “have claimed direct, personal injury arising from the fact that the federal defendants’ failure to enforce the political action limitations of section 501(c)(3) has placed the plaintiffs at a competitive disadvantage with the Catholic Church in the arena of public advocacy on important public issues” (Pet. App. 19a).

This “competitive disadvantage” allegation simply does not establish a basis for standing to invoke the jurisdiction of an Article III court. Standing cannot be conferred merely on the basis of the statement that the plaintiffs are necessarily disadvantaged in the political arena as a logical corollary to the fact that the Church’s

tax exemption allegedly gives it an advantage. That statement, standing alone, does not allege a concrete injury; it merely states that the plaintiffs "suffer[] in some indefinite way in common" (*Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)) with every voter or participant in the political arena that does not share the Church's views. Indeed, an essentially similar complaint could be made by any participant in the political process about any aspect of the tax or regulatory treatment of any other participant in that process. Such a complaint of resulting "imbalance in the electoral and legislative process" (Pet. App. 74a) no more represents a personal, judicially cognizable, injury to the plaintiffs than does their "denigration" claim.

Nor have plaintiffs alleged that this asserted "competitive disadvantage" has some concrete effect that causes personal injury to themselves. In this voter context, the essence of a claim of concrete injury must be that the electoral fortunes of causes or candidates that the plaintiffs support are being harmed by the existence of the Church's tax exemption and, concomitantly, that that harm would be remedied by the relief requested here. But, as even the district court acknowledged (see Pet. App. 73a-74a), the Church's tax exemption does not have that kind of direct effect on electoral results or legislative decisions; rather, the exemption's effect on such concrete matters is at most "diffuse, minute, and indeterminable" (*Daughtrey v. Carter*, 584 F.2d 1050, 1056 (D.C. Cir. 1978)). Accordingly, the plaintiffs here have alleged no concrete injury to themselves as "voters" that can be traced to the government action they seek to challenge, and hence they fail to meet the fundamental standing requirements this Court has recognized.

b. This Court has repeatedly emphasized that an alleged injury can confer Article III standing only if it "fairly can be traced to the challenged action of the defendant, and [is] not injury that results from the independent action of some third party not before the court" (*Simon v. Eastern Kentucky Welfare Rights Organiza-*

tion, 426 U.S. at 41-42). See also *Warth v. Seldin*, 422 U.S. at 505. The *Eastern Kentucky* case, like this one, involved a suit challenging the Commissioner's grant of a tax exemption to third parties—hospitals that had denied medical care to the indigent plaintiffs. The plaintiffs challenged the hospitals' tax exemption on the ground that a hospital that does not treat indigent patients in the plaintiffs' position is not a "charitable" institution that should be tax-exempt under Section 501(c)(3).

This Court held that the injury suffered by the plaintiffs did not give them standing to challenge the hospitals' tax exemption. The Court explained that the only defendants were the federal officials involved, and the only action challenged in the suit was the grant of the tax exemption. But it was "speculative" whether the hospitals' failure to treat the plaintiffs was attributable to the Commissioner's actions, rather than to "decisions made by the hospitals without regard to the tax implications" (426 U.S. at 42-43). And it was "equally speculative whether the desired exercise of the Court's remedial powers in this suit would result in the availability to [the plaintiffs] of such [medical] services" (*id.* at 43). Rather, it was "just as plausible that the hospitals * * * would elect to forgo favorable tax treatment" (*ibid.*). The Court concluded, therefore, that the suit should be dismissed for lack of standing because the plaintiffs had failed "to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm" (*id.* at 44-45 (quoting *Warth v. Seldin*, 422 U.S. at 505)).

In *Allen v. Wright*, *supra*, the Court similarly held that the plaintiffs lacked standing because the alleged injury—inadequate desegregation of the public schools—was not properly traceable to the tax exemptions that they were challenging. The plaintiffs contended that the withdrawal of tax exemptions from segregated private schools would yield changes that would reduce their enrollment, with some students transferring to, and thus

further desegregating, the public schools. The Court held, however, that this connection was too tenuous to permit the public school parents to challenge the tax exemptions of the private schools. The Court explained that it was "entirely speculative" whether "withdrawal of a tax exemption from any particular school would lead the school to change its policies" and "just as speculative" whether "any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status" (468 U.S. at 758). Therefore, the "chain of causation" that formed the basis for the claim of standing "involve[d] numerous third parties * * * whose independent decisions may not collectively have a significant effect on the ability of public school students to receive a desegregated education" (*id.* at 759).

As in *Allen and Eastern Kentucky*, the causal connection here between the third party's tax exemption and any concrete injury suffered by the plaintiffs is too speculative to confer standing to sue the federal defendants. It is pure conjecture whether a change in the status of the Catholic Church's tax exemption would enhance the plaintiffs' position in the abortion controversy. First, it is unknown whether withdrawal of the Church's tax exemption would lead to any change in the Church's resources and activities. Obviously, many people contribute to the Church for reasons that have little or nothing to do with the tax consequences; a change in the Church's tax-exempt status would not necessarily affect their level of contributions to any significant degree. And, even if there were some overall reduction in contribution levels, one cannot predict how that would affect the Church's alleged political activity. Moreover, a change in the Church's policies, standing alone, would not alleviate the injury allegedly suffered by petitioners. The candidates and causes that the plaintiffs support in the abortion controversy can be advanced in the political arena only through the decisions of numerous voters. It is entirely

speculative whether a hypothetical change in the Church's political activity would influence the decisions of enough voters to have an impact on any given election.

Indeed, the plaintiffs and the district court do not appear to dispute that the relief the plaintiffs seek here will not necessarily advance their position in the abortion controversy. The plaintiffs state (Br. in Opp. 54) that it is "irrelevant" whether "the Church will continue to be active politically" if its exemption is revoked; the district court agreed that "[t]he standing question is unaffected by the church defendants' possible resolve to continue their current rate of political activity" despite an adverse decision with respect to their tax exemption (Pet. App. 73a-74a). But these observations clearly betray a misconception of the controlling legal principles. It is fundamental that Article III requires that the plaintiff be personally injured by the action he is challenging and that the injury will be redressed by the relief he seeks. See *Allen v. Wright*, 468 U.S. at 751, 753 n.19. Thus, Article III does not permit the plaintiffs to allege an injury consisting of a disfavored position in the abortion debate or other political controversy as the basis for a challenge to the validity of the Church's tax exemption, since that unfavorable position cannot properly be said to result from the granting of the tax exemption or to be likely to be altered by its withdrawal. In essence, the plaintiffs' complaint presents only another species of a suit brought by a person understandably distressed, but not directly affected, by what he views as the government's failure to enforce the law against a third party. See *Valley Forge*, 454 U.S. at 485.¹³

¹³ The plaintiffs have no adequate response to this difficulty. They state that "the injury * * * is not the Catholic Church's political activities *per se*, but the government's subsidy of those activities" (Br. in Opp. 56); the district court states that "[r]edress will come directly from the government's consistent enforcement of the tax laws, not from any change in the political activities of the Church" (Pet. App. 97a). But these statements mark a return to the contention, akin to the plaintiffs' "denigration" claim, that the mere fact that the Church allegedly receives favorable treatment is enough to

In sum, the injury of which the plaintiffs complain in this case—an alleged disadvantage in the political arena for the position they espouse in the abortion controversy—is not one that can be remedied by the Commissioner of Internal Revenue or the Secretary of the Treasury, who are the defendants in this action. Rather, any improvement in the plaintiffs' position in the abortion controversy depends largely on the "independent action of * * * third part[ies] not before the court" (*Eastern Kentucky*, 426 U.S. at 42). Therefore, as in *Eastern Kentucky* and *Allen*, the plaintiffs have suffered no concrete injury traceable to the conduct of the federal defendants, or redressable by the requested relief, that can justify this lawsuit against them.

Moreover, quite apart from the fact that the relief requested by the plaintiffs will not redress the personal injury of which they complain, as a practical matter the plaintiffs cannot possibly obtain in this lawsuit the relief that they request. The plaintiffs seek a declaration that the government has violated the law in failing to revoke the Church's tax exemption and an order directing the government to revoke the Church's tax exemption and to assess and collect back taxes due as a result of the revocation (J.A. 18-19). But the Church was long ago dismissed as a party from this suit. If the district court were to enter an order directing the federal defendants to withdraw the Church's tax exemption and to assess back taxes, the Church would remain free to challenge the revocation in a declaratory judgment action

support standing. That simply cannot be correct; if the mere fact of favored treatment of one party is enough to constitute a concrete injury to another, then any interested party can challenge a perceived violation of the law by the government. But "[t]he federal courts were simply not constituted as ombudsmen of the general welfare" (*Valley Forge*, 454 U.S. at 487), and therefore the plaintiffs may not bring suit merely to ensure "consistent enforcement of the tax laws" (Pet. App. 97a). Rather, the plaintiffs here can demonstrate standing only if the alleged failure in government enforcement causes a concrete injury to them. They essentially acknowledge, however, that they cannot allege such a concrete injury.

under Section 7428 of the Code, or to challenge in normal fashion any deficiency asserted, either by filing a petition in the Tax Court or by filing a refund suit in the district court. Because the Church is not a party to the underlying litigation here, the district court's decision would have no res judicata or collateral estoppel effect in later litigation. Thus, far from ending the matter, a ruling here in the plaintiffs' favor would not resolve the validity of the Church's tax exemption; it would only act as a catalyst to further litigation in another forum. Thus, this lawsuit well illustrates the concern repeatedly expressed by this Court over cases raising "questions of broad social import where no individual rights would be vindicated" (*Gladstone, Realtors v. Village of Bellwood*, 441 U.S. at 100).

c. The fact that the injury claimed by the plaintiffs assertedly arises out of their status as "voters" provides no basis for departing from the basic standing principles we have discussed. In particular, the district court's reliance on *Baker v. Carr*, *supra*, is in error. *Baker* was a suit brought against state officials to challenge the malapportionment of the voting district in which the plaintiffs resided and were registered to vote. The plaintiffs lived in a "disfavored" county, one with a "gross disproportion of representation to voting population" (369 U.S. at 207). The Court found that the plaintiffs suffered concrete injury to their voting power on that account—an injury that the Court analogized to "dilution" of the vote by "a false tally" or by "stuffing of the ballot box" (*id.* at 208). *Baker* thus involved a "concrete injury to fundamental voting rights" (*Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 223 n.13 (1974)) and does not represent a departure from the general standing principles more recently reaffirmed in *Eastern Kentucky* and *Allen*.

The claim of the plaintiffs here is quite different. They clearly do not claim a dilution in voting power; as the district court acknowledged (Pet. App. 73a), they "do not complain of diminished representation and do not demand increases in actual representation." They do not

claim that any candidate has been deprived of an opportunity to run for office or to appear on a ballot, nor do they claim that any voter has been hampered in an effort to vote for the candidate of his choice. In short, the plaintiffs do not challenge any aspect of the electoral process. What they do claim is that the tax exemption conferred upon the Catholic Church gives the Church a financial advantage over the plaintiffs in an area in which they allegedly compete, namely, the political arena. This is not truly a challenge based on the plaintiffs' status as "voters," and it surely bears no resemblance to the claim upon which standing rested in *Baker*.

In *Winpisinger v. Watson*, 628 F.2d 133 (1980), the District of Columbia Circuit rejected a "voter standing" contention somewhat akin to that of the plaintiffs here, and that court's analysis is instructive. The plaintiffs in *Winpisinger* were supporters of Senator Kennedy in his contest with President Carter for the Democratic presidential nomination. They alleged that President Carter's campaign workers were illegally using federal funds for campaign purposes, thereby giving the President an unfair advantage over Senator Kennedy in the campaign. Even though the injury complained of by the plaintiffs was focused on a single electoral contest between two candidates, and hence was considerably more immediate and focused than the general disadvantage claimed here, the court of appeals correctly held that the plaintiffs in *Winpisinger* lacked standing because the alleged injury was not directly traceable to the challenged conduct. The court explained that "[t]he endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, caucuses and conventions forecloses any reliable conclusion that voter support of a candidate is 'fairly traceable' to any particular event"; in order to connect the alleged injury with the challenged actions of the Carter supporters, the court would have had "to accept a number of very speculative inferences and assumptions" (628 F.2d at 139). In sum, the District of Columbia Circuit correctly held that a plaintiff

does not have standing to challenge a perceived advantage granted to someone else merely because the two parties are adversaries in the political arena (where the alleged advantage does not directly affect participation in that arena).¹⁴ The plaintiffs in this case have made no allegation of a more concrete injury that would justify departing from this rule here.¹⁵

¹⁴ In reaching a contrary conclusion here, the district court relied heavily (see Pet. App. 71a-73a) on *Shakman v. Democratic Organization*, 435 F.2d 267 (7th Cir. 1970), cert. denied, 402 U.S. 909 (1971) (*Shakman I*), where a group of voters was held to have standing to sue the county challenging alleged abuses of the patronage system. That case, however, is of little precedential value. The correctness of *Shakman* in light of the intervening standing decisions of this Court has been questioned by other courts. See, e.g., *Winpisinger v. Watson*, 628 F.2d at 141 & n.32. Indeed, the Seventh Circuit itself recently revisited *Shakman* in a subsequent appeal in the same case, and it concluded that, because of the major changes in the "legal landscape" since its earlier decision, its prior finding of standing could not be regarded as binding law of the case and would have to be reconsidered (*Shakman v. Dunne*, 829 F.2d 1387, 1393 (1987)). Upon reexamination, the court concluded that the plaintiffs lacked standing to challenge the hiring practices of the incumbent county administration, and hence that the complaint had to be dismissed to that extent (the original complaint had challenged a broader spectrum of patronage practices). Significantly, the Seventh Circuit relied heavily on *Winpisinger* in concluding that the alleged connection between the challenged patronage hiring practices and the injury—a disadvantage to electoral opponents of the incumbent because persons would be induced to work for the incumbent in expectation of receiving a patronage job—was too speculative to support standing (see 829 F.2d at 1397-1398). In any event, even if *Shakman I* were regarded as still authoritative, it involved a challenge to patronage practices in "a single County, not a coordinate branch of the federal government" (*Winpisinger v. Watson*, 628 F.2d at 141 n.32), and its holding therefore has little bearing in the present context of a nationwide suit against an arm of the federal government.

¹⁵ Indeed, the causal link in the instant case is considerably more tenuous than it was in *Winpisinger* because an additional set of conjectures concerning the possibility of changes in the Church's activities must be accepted before the uncertainties of the electoral process even come into play.

d. In fact, the district court's use of the term "voter standing" to characterize the plaintiffs' claim is a misnomer. As the plaintiffs state in their complaint, the gravamen of their claim is that the Catholic Church is their "competitor" in the political arena, and therefore any advantage conferred upon the Church "automatically constitutes a handicap" to the plaintiffs (J.A. 15). The court of appeals similarly recognized that the plaintiffs' contention boiled down to a complaint that they have been placed at a "competitive disadvantage with the Catholic Church in the arena of public advocacy" (Pet. App. 1988 n.3). Their claim accordingly is better characterized as one of "competitor standing"; the electoral or political arena merely happens to be a particular area in which the plaintiffs and the Catholic Church "compete."

Viewed in this light, it is once again apparent that the injury complained of by the plaintiffs cannot be sufficient to confer standing to challenge the Church's tax exemption. This Court, of course, has recognized that a competitive injury can confer standing on a plaintiff to challenge an action that most directly affects a third party. See, e.g., *Clarke v. Securities Industry Ass'n*, No. 85-971 (Jan. 14, 1987); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). But an absolute prerequisite to such standing, derived from Article III, is that the plaintiff himself must suffer an "injury in fact" from the challenged action (see *id.* at 152). There was no doubt that this requirement was met in *Data Processing* and *Clarke*, where the dispute was whether a class of companies would be allowed to compete with the plaintiffs in a particular business (see *Clarke*, slip op. 5, 14; *Data Processing*, 397 U.S. at 152). Here, however, the injury alleged by the plaintiffs is not sufficient to justify a claim of "competitor standing."

The plaintiffs' argument on this point is based on a series of related assumptions. The plaintiffs allege that they are competitors of the Catholic Church in the politi-

cal arena and that any "advantage granted to one competitor automatically constitutes a handicap to the others" (J.A. 15). At the same time, the plaintiffs maintain that the Church's tax-exempt status necessarily gives it a "financial advantage" (*ibid.*). And this financial advantage apparently automatically gives the Church a "political advantage" (*ibid.*). Altogether, what the plaintiffs argue is that whenever someone receives any money or avoids an expense—for example, by means of a tax benefit—that infusion of funds necessarily injures its competitors, and the competitors have standing to challenge the legality of the receipt or retention of funds.

This type of assumed injury, however, clearly is not sufficient to satisfy the standing criteria set forth by this Court. Indeed, the logical implications of the plaintiffs' theory are so far-reaching that, if adopted, it would dramatically subvert the limitations of Article III. Competing organizations, whether or not tax-exempt, presumably could sue to revoke the tax exemption of a civic league, labor union, or business league (see I.R.C. § 501 (c) (4), (5), and (6)). Outside the specific area of tax exemptions, one businessman presumably could sue the government claiming that the IRS had been too generous in allowing his competitor to take a particular deduction. Or, even outside the tax area, any government action that redounded to the financial benefit of a competitor might be challenged by a third party—for example, a competitor might claim that the government had been too lenient in imposing an administrative fine on another company for certain environmental or safety violations. All of these claims fail to satisfy Article III because the causal connection between an increase in a competitor's bank account and an injury to the plaintiff is too tenuous; the injury is not "fairly traceable" (*Allen v. Wright*, 468 U.S. at 751) to the challenged government conduct. The competitive injury alleged by the plaintiffs here is no different in principle from the hypothetical cases we have described; the only injury the plaintiffs allege is that the Church's tax exemption allows it to receive more money

than it would if the tax laws were properly enforced, and that those additional funds received by the plaintiffs' competitor necessarily injure them in the arena in which they compete. The decisions of this Court clearly establish that Article III requires a more direct causal relationship between a palpable injury suffered by the plaintiffs and the challenged conduct of the defendants.

The deficiencies of the plaintiffs' theory are illuminated in *American Society of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), cert. denied, 435 U.S. 947 (1978). The plaintiffs there were travel agents who brought suit against the government challenging the tax treatment of certain tax-exempt organizations who offered travel programs. The plaintiffs' contention was that the financial benefits of tax-exempt status enjoyed by these organizations gave them an "unfair competitive advantage in the sale of tour packages" (566 F.2d at 148). The plaintiffs did not, however, point to any concrete effect on their business; rather, they alleged an injury from the government's "creation of an unfair competitive atmosphere" and sought "relief in the form of the more congenial competitive environment which would supposedly result from proper tax enforcement policy" (*id.* at 149). Relying primarily on this Court's decision in *Eastern Kentucky*, the court of appeals concluded that "this sort of injury claim [is] too speculative to support standing" (*ibid.*) and does not establish "injury in fact" (*id.* at 148). The court of appeals unequivocally rejected the plaintiffs' reliance on *Data Processing*, stating that "we do not believe that *Data Processing* should be read to endorse standing for any private business, individual or corporate, which wishes to contest the tax treatment of a competitor" (566 F.2d at 151). For the same reasons, the plaintiffs' effort here to challenge their competitor's tax exemption—in which a causal connection between the tax treatment and any concrete injury suffered by the plaintiffs is considerably more attenuated and speculative than it was in *American Society of Travel Agents*—fails to satisfy the strictures of Article III.

4. *The District Court's Assumption Of Jurisdiction Over This Lawsuit Is Fundamentally At Odds With The Separation Of Powers Principles That Underlie The Doctrine Of Standing*

This Court has explained that "the pervasive and fundamental notion of separation of powers" plays a basic role in the Article III standing inquiry in that it "counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties" (*Allen v. Wright*, 468 U.S. at 752, 761). See also *Valley Forge*, 454 U.S. at 474-475. In *Allen*, the Court concluded that conferring standing on the plaintiffs to challenge the tax exemption of a third party could not be squared with this basic principle. That is no less true here. The plaintiffs seek to compel the Executive Branch to undertake a nationwide review of the activities of a tax-exempt organization in order to determine whether it continues to qualify for exemption. But suits challenging an Executive agency's enforcement program, even when "premised on allegations of several instances of violations of law," are "rarely if ever appropriate for federal-court adjudication" (*Allen v. Wright*, 468 U.S. at 759-760). In the absence of an assertion of concrete and remediable injury directly attributable to unlawful government conduct, the courts do not assume the "amorphous [task of] general supervision of the operations of government" (*United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring)), nor act "as virtually continuing monitors of the wisdom and soundness of Executive action" (*Laird v. Tatum*, 408 U.S. 1, 15 (1972)). And, as the Court recently emphasized in another context, a suit to compel an agency to undertake a specific enforcement inquiry is particularly unsuitable for judicial resolution because "an agency decision not to enforce often involves a complicated balancing of a num-

ber of factors which are peculiarly within its expertise" (*Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).¹⁶

The administration of the tax laws presents a particularly strong case for refusal by the courts to hear a claim like that being pressed by the plaintiffs because such a claim intrudes into a detailed structure erected by Congress to govern tax enforcement. Congress has delegated "the administration and enforcement of" the tax laws exclusively to the Secretary and the Commissioner (I.R.C. § 7801(a)), including the power to "prescribe all needful rules and regulations for the enforcement of" those laws (I.R.C. § 7805(a)). Congress has reserved to itself the task of overseeing the enforcement of the revenue laws by creating a Joint Committee on Taxation to investigate the administration, operation, and effects of the tax system (I.R.C. §§ 8001-8023).¹⁷ At the same time, Congress has established precisely-defined channels for the

¹⁶ The Court in *Chaney* identified some of those factors as follows (470 U.S. at 831-832):

[T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

¹⁷ Congress's oversight responsibility is not taken lightly. Indeed, last summer a congressional committee, after careful study, issued a report and recommendations on the very subject that underlies this lawsuit—namely, political activities of tax-exempt organizations. See Staff of the House Subcomm. on Oversight of the Comm. on Ways and Means, 100th Cong., 1st Sess., *WMCP: 100-12, Report and Recommendations on Lobbying and Political Activities by Tax-Exempt Organizations* (Comm. Print 1987). And last month Congress enacted legislation addressing the question of political and lobbying activities of tax-exempt organizations. See Sections 10711-10714 of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203 (Dec. 22, 1987).

adjudication of tax disputes initiated by private parties—proceedings in the Tax Court to redetermine deficiencies (I.R.C. §§ 6212, 6213), refund or collection actions in the district courts or the Claims Court (I.R.C. §§ 6532, 7422; 28 U.S.C. 1346, 1491), and, in specific and limited circumstances, declaratory judgment actions, *e.g.*, by an organization seeking recognition of its own tax-exempt status under Section 501(c)(3) (I.R.C. § 7428). Apart from these avenues of relief, Congress has precluded "any person, whether or not such person is the person against whom such tax was assessed," from maintaining a "suit for the purpose of restraining the assessment or collection of any tax" (I.R.C. § 7421(a)), and has barred declaratory relief in all actions "with respect to Federal taxes" (28 U.S.C. (Supp. III) 2201). This structure reflects a deliberate judgment that the vigor of the government's enforcement of the tax laws is generally not a matter for litigation instituted by private parties. In particular, Congress has indicated that invocation of judicial examination of the validity of a particular organization's tax exemption is the prerogative only of the government and the organization in question, not of third parties.

The specifics of this case graphically illustrate the mischief that would flow from conferring standing on persons such as the plaintiffs to challenge the tax exemption of a third party. At the behest of a litigant who is not directly affected, the district court is poised to conduct a nationwide review of the IRS's administration and enforcement of Section 501(c)(3), an inquiry that will intrude into the sensitive internal workings of both the government and the Roman Catholic Church. The Church includes many thousands of organizations across the country—parishes, dioceses, schools, hospitals, and others—that, for administrative purposes, fall under the "umbrella" exemption given to the petitioners. The plaintiffs would have the district court substitute its judgment for the enforcement judgment of the IRS by reviewing the internal affairs of a multitude of those entities to deter-

mine whether they engage in more political activity than their status under Section 501(c)(3) permits. Moreover, as developments in this case have already shown, this judicial inquiry would likely touch upon confidential tax return information collected by the IRS and result in constitutional controversy over efforts to obtain Church documents and to take testimony from Church officials.¹⁸ Such a judicial undertaking cannot properly be required, or justified, on behalf of litigants whose own tax liability is unaffected by the administrative action they seek to challenge.

The district court's response to these separation of powers concerns is entirely wide of the mark. The court acknowledged that there are limitations on access to the courts "to resolve abstract policy questions of broad pub-

¹⁸ It is highly pertinent that the executive function that the plaintiffs ask the district court to assume here involves the sensitive task of separating church activities relating to the exercise of religious beliefs—such as the announcement of positions taken on theological grounds—from impermissible lobbying and intervention in political campaigns (cf. *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 78 (1st Cir. 1979)). As this Court observed in *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971), "state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids." The possibilities for excessive government entanglement with religion that are inherent in the inquiry that the plaintiffs seek to compel here further counsel against interjection of the courts into the exercise of this executive function. Indeed, the difficulties attending church audits recently prompted Congress to enact detailed remedial legislation (see Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 1033(a), 98 Stat. 1034; H.R. Conf. Rep. 98-861, 98th Cong., 2d Sess. 1101-1114 (1984)), which establishes stringent procedural safeguards in the conduct of examinations of churches. These restrictions, however, are directed to government investigation of religious activity, rather than to investigations conducted by private parties, and by their terms would not appear to apply to a lawsuit like this one. Thus, entertainment of such a suit by the federal courts might well have the anomalous effect of granting the plaintiffs greater license to investigate the Church's continuing qualification for tax exemption than Congress allows to the agency that it has charged with the enforcement of the tax laws.

lic importance" (Pet. App. 79a). But the court stated that "[n]ot all issues of broad public importance * * * are necessarily, or even better, left to the executive and the legislature" (*ibid.*). It found that the limitations on judicial action are not implicated here because the plaintiffs do not "call for judicial selection of an appropriate policy"; the correct policy already has been chosen by Congress and set forth in Section 501(c)(3) (Pet. App. 79a).

The district court thus fails to recognize that courts can impermissibly intrude into matters reserved to the Executive even if they do not resolve "abstract policy questions." In this case, as in *Allen*, the plaintiffs do not challenge "a fundamental IRS policy decision" (468 U.S. at 765). On the contrary, the parties agree that organizations exempt from tax under Section 501(c)(3) are restricted from engaging in political activity; the Treasury regulations are quite explicit on this point (see, e.g., Treas. Regs. §§ 1.501(c)(3)-1(b)(3), 1.501(c)(3)-1(c)(3)). What the plaintiffs challenge—and seek to have the court control—are the details of the execution of that policy, which is but one of the numerous facets of the Internal Revenue Code that it is the duty of the Secretary of the Treasury to administer. The plaintiffs "seek to have the Judicial Branch compel the Executive Branch to act in conformity" with the law (*Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. at 217), according to enforcement procedures and criteria that the plaintiffs and the court devise. In short, the plaintiffs invoke the courts here not to obtain a binding resolution of a specific legal question in which they have a cognizable interest, but rather to exercise control over the Executive Branch's administration of its law enforcement responsibilities. This Court has made clear that litigants may not resort to the federal courts for that purpose.

Finally, in addition to the constitutional infirmities in the plaintiffs' standing claim, all three of the factors that the Court has identified as forming the prudential limi-

tations on standing (see *Allen v. Wright*, 468 U.S. at 751) militate against entertainment of this lawsuit. The plaintiffs are seeking to vindicate not their own legal rights, but rather the *government's* right to collect taxes from an organization (and from its contributors) that allegedly is not eligible for a tax exemption. The plaintiffs' concern about tax law enforcement is "more appropriately addressed in the representative branches" (*ibid.*), i.e., through the congressional oversight procedures established by statute. And the plaintiffs' complaint does not "fall within the zone of interests protected" by Section 501(c)(3), which simply defines those organizations that Congress has determined should be granted a tax exemption because of their "charitable" or "religious" purposes (see 468 U.S. at 751).

In sum, it is manifest that the plaintiffs lack standing to maintain this lawsuit. As in *Allen*, "[r]ecognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders'" (468 U.S. at 756, quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)).¹⁹

¹⁹ Moreover, permitting the present case to proceed to trial would encourage similar suits by third parties dissatisfied with the tax treatment of other groups with whose views they disagree. Even if such suits would ultimately fail on the merits, they could be used for purposes of securing information through discovery for utilization in public debate, as well as a means of turning the courts themselves into fora for policy debate rather than adjudicative tribunals.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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QUESTIONS PRESENTED

1. Whether a non-party witness, appealing a civil contempt order for refusing to produce documents, can challenge the District Court's prior denials of motions to dismiss for lack of subject matter jurisdiction.

2. If so, whether plaintiffs-respondents have standing as clergy members and participants in the political process to challenge the government's unconstitutional and unlawful enforcement of a provision of the Internal Revenue Code.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 87-416

UNITED STATES CATHOLIC CONFERENCE
and
NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Petitioners,

- against -

ABORTION RIGHTS MOBILIZATION, INC.,
et al.,

Respondents.

*On a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit*

BRIEF FOR RESPONDENTS
ABORTION RIGHTS MOBILIZATION, INC., et al.

Additional Constitutional Provision Involved

The Establishment Clause of the
First Amendment to the Constitution pro-
vides:

Congress shall make no law respec-
ting an establishment of religion
. . . .

U.S. Const., Amend. I.

Statement of the Case

This case arises from a contempt order issued in an action challenging the government's selective enforcement of the provision of the tax code forbidding partisan political activities by religious and other charitable organizations. Petitioners are two non-party witnesses held in contempt by the District Court (whose ruling was affirmed by the Court of Appeals) for refusing since February 1983 to produce subpoenaed documents while "wilfully misle[ading] the court and the plaintiffs and . . . ma[king] a travesty of the court process." (Pet. App. 44a-45a)¹

Although it is petitioners' refusal to comply with subpoenas that has given

¹/References to "Pet. App. " are to pages in the appendix to the petition for a writ of certiorari. References to "J.A." are to pages in the joint appendix in this Court. References to "C.A. App. A " are to pages in the joint appendix in the Court of Appeals.

rise to the contempt order and this proceeding, petitioners raise no objection to the subpoenas themselves. They make no arguments concerning relevance, privilege, burden or the like. Their sole contention on appeal is that the District Court erred in failing to dismiss the complaint for lack of subject matter jurisdiction. Indeed, their admitted "sole" motivation for refusing to produce the subpoenaed documents was to obtain appellate review of the District Court's decisions denying dismissal of the action. (J.A. 103)

What petitioners seek, in other words, is to evade both the rule against interlocutory appeals and the constraints on issuance of extraordinary writs and to obtain what no appellate court has ever permitted, either to a party or a non-party: a direct appeal, in the guise of an appeal from a contempt order, of a

district court's denial of a motion to dismiss.

The United States Court of Appeals for the Second Circuit rightly refused to permit such an evasion. This Court should do the same.

The Underlying Action

For well over half a century it has been settled public policy that the tax code shall not be used to subsidize the political activities of charitable organizations. As Judge Learned Hand, reviewing an administrative decision denying a tax deduction for gifts to a charity engaged in legislative lobbying activities, wrote in 1930:

Political agitation as such is outside the statute, however innocent the aim. . . . Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them.

Slee v. Commissioner, 42 F.2d 184, 185
(2d Cir. 1930).

In 1934, Congress partially codified the policy expressed by Judge Hand and specifically provided that contributions to charities a "substantial part of [whose] activities is carrying on propaganda, or otherwise attempting, to influence legislation" shall not be deductible to the donor. Revenue Act of 1934, § 517, 48 Stat. 760.²

Twenty years later, Congress added the provision that is the subject of this lawsuit. When revising the Internal Revenue Code in 1954, Congress amended 26 U.S.C. § 501(c)(3) to prohibit the granting of tax-exempt status to religious and other charitable organizations that

²/An attempt to extend the prohibition to "participation in partisan politics" was not adopted at that time. Lobbying and Political Activities of Tax-exempt Organizations: Hearings before the Subcomm. on Oversight of the House Comm. on Ways and Means, 100th Cong., 1st Sess. 344-48 (1987) (hereinafter "House Hearings") (Congressional Research Service Report).

participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.³

By thus prohibiting tax-exempt organizations from engaging in any partisan political activity, Congress adopted in full the rule laid down by Judge Hand twenty-four years earlier that the Treasury would not fund "political agitation" in the name of charitable causes.

But the will of Congress and the mandate of the Constitution have been

³/The amendment was proposed on the Senate floor by then Senator Lyndon Baines Johnson and was adopted with little debate or discussion. 100 Cong. Rec. 9604. House Hearings 348 (Congressional Research Service Report).

The Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10711 (Dec. 22, 1987), makes it explicit that the ban on campaign activities also extends to activities "in opposition to" candidates, a position long held by the Internal Revenue Service. Treas. Reg. § 1.501(c)(3)-1(b)(3)(ii).

frustrated. By refusing to enforce this provision of the tax code against one particular religious organization politically active in the abortion-rights debate, the government has effectively granted to that preferred participant a subsidy, to its advantage and to the disadvantage of others for whom abortion rights issues are no less important but who take a different position. It is to end this unconstitutional favoritism of one religion over others and to end the unconstitutional distortion by the government of the process of public debate that respondents have brought this action.

The amended complaint alleges,⁴ in brief, that the Roman Catholic

4/As the issue of standing was raised below on motions to dismiss, the Court is required to accept as true all the material allegations of the amended complaint (J.A. 5-19) and the affidavits submitted by respondents in opposition to the motions (J.A. 28-66), and to construe these facts [Footnote 4 continued on next page]

Church in the United States ("the Church" or "the Catholic Church"), in violation of the clear language and intent of the anti-electioneering provision of 26 U.S.C. § 501(c)(3), has engaged in a persistent and regular pattern of intervening in elections nationwide in favor of candidates who support the Church's position on abortion and in opposition to candidates with opposing views. (J.A. 10-13)⁵

The government respondents, the Secretary of the Treasury and the

[Footnote 4 continued from previous page] in the light most favorable to the respondents. *Pennell v. City of San Jose*, No. 86-753, slip. op. at 4-5 (Feb. 24, 1988); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109 n.22, 112 (1979); *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

⁵/The amended complaint is limited solely to "electioneering" -- partisan political activity. It does not challenge the IRS' enforcement of tax code provisions governing lobbying and does not include any allegations concerning the Catholic Church's lobbying activities.

Commissioner of Internal Revenue, (defendants below, referred to herein as "the government" or the "IRS"), despite their knowledge of these activities, have done nothing to enforce the law against such violations. (J.A. 13-14)

By thus exempting the Catholic Church from the tax code, the IRS, in violation of the clear command of Congress, has granted the Church the equivalent of a cash subsidy for its partisan political activity⁶ -- a

6/ Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions.

Regan v. Taxation With Representation, 461 U.S. 540, 544 (1983) (footnote omitted).

subsidy denied to respondents (the plaintiffs below) in violation, inter alia, of their rights under the Establishment Clause of the First Amendment. Respondents seek, among other relief, an order requiring the IRS to take appropriate enforcement action against the Catholic Church. (J.A. 18-19)

Filed in January 1981, the amended complaint details the Church's "active[] and systematic[] participat[ion] in political campaigns in all parts of the country, supporting 'pro-life' and opposing 'pro-choice' candidates for public office." (J.A. 11) The "blueprint" for the campaign is the "Pastoral Plan for Pro-Life Activities" adopted by petitioners⁷ in November 1975. (J.A. 10-11; C.A. App. A 480-93) The Plan calls for the mobilization of "all church-sponsored or identifiable Catholic" organizations, agencies, priests and lay persons in a "major"

⁷/ Petitioners are the United States Catholic Conference ("USCC") and the National Conference of Catholic Bishops ("NCCB"), each comprised of the 350 active Roman Catholic bishops in the United States. USCC, a Washington, D.C. corporation, is the Church's "secular" arm and NCCB, an unincorporated association, is its "ecclesiastical" or pastoral arm. The membership, officers and principal staff of the two organizations are the same. (J.A. 9) The USCC holds a single group tax-exemption letter from the IRS which covers every Catholic entity in the United States. (J.A. 24-27, 104-05)

educational, pastoral and political effort to outlaw abortion in the United States. (J.A. 11) On the political front, the Plan calls for the creation -- in every congressional district in the country -- of "congressional district pro-life action group[s]" whose objectives are, inter alia:

8. To elect members of their own group or active sympathizers to specific posts in all local party organizations. . . .
10. To maintain an informational file on the pro-life position of every elected official and potential candidate.
11. To work for qualified candidates who will vote for a constitutional amendment, and other pro-life issues. . . .

(Id.)

Pursuant to the Pastoral Plan and Church policy, Catholic Church officials have played prominent, tax-subsidized roles in many major political campaigns. In 1976, for example, the Archdiocese of New York donated "substantial sums"

towards the senatorial candidacy of James Buckley. (J.A. 13) In 1978, Church officials used church publications to campaign throughout the Pittsburgh, Pennsylvania diocese against the re-election of Congressman William Moorehead. (J.A. 12)

In the months before this case was filed in 1980, Church officials were politically active in many parts of the country. In April, a South Dakota priest attacked Senator George McGovern and publicly sought the support of other priests for his opponent's campaign. In May, the official newspaper of the San Antonio, Texas Archdiocese published an editorial supporting Ronald Reagan in the Texas presidential primary. The editorial was entitled "To the IRS--'NUTS!!!" (J.A. 12; C.A. App. A 535)

A few months later, in September 1980, the Archdiocese of Boston and the

Diocese of Worcester campaigned publicly against the nomination of two "pro-choice" congressional candidates in the Boston area. (J.A. 12) Humberto Cardinal Medeiros of Boston issued a letter attacking the two candidates which was read from 410 pulpits a few days before the primary election and published in the official archdiocesan newspaper. (Id.) Monsignor Battista of the Worcester Diocese also published and distributed widely a letter attacking by name one of the candidates. (Id.)⁸

Tax-subsidized Catholic electioneering has continued since the filing of this lawsuit, most notably in the 1984 presidential campaign. John Cardinal Krol, Buffalo Bishop Edward Head and Newark Bishop Peter Gerety appeared at political rallies in their respective

8/Monsignor Battista's letter was signed by seventy clergy members of the Worcester Diocese. Boston Globe, Sept. 11, 1980, at 1, 25.

communities held in support of Ronald Reagan's re-election. (See Hentoff, Profile: "I'm Finally Going To Be a Pastor," Part 2, The New Yorker, Mar. 30, 1987, at 43; N.Y. Times, Sept. 10, 1984, at B9, col. 1.) Boston Archbishop Bernard Law and seventeen other New England bishops issued a statement that abortion was "the critical issue" of the presidential campaign and urged voters to judge candidates by their positions on abortion. (Boston Globe, Sept. 5, 1984, at 1; N.Y. Times, Sept. 23, 1984, sec. 1 at 34) In New York, then Archbishop O'Connor went on television to urge Catholics not to vote for candidates who favored abortions and to criticize Vice Presidential candidate Geraldine Ferraro's position on abortion as being anti-Catholic.⁹

⁹/See, e.g., N.Y. Times, Sept. 10, 1984, at A1, col. 8; "Politics and the Pulpit," Newsweek, Sept. 17, 1984, at 24, col. 1; "For God and Country," [Footnote 9 continued on next page]

The adoption of the 1975 Pastoral Plan and the subsequent record of official Catholic Church electioneering received wide-spread publicity in the national press. (J.A. 13) The IRS was also specifically informed of some of these activities by various citizens and taxpayers who requested the Service take enforcement action. (Id.) In addition, the pervasive role of the Catholic Church in Minnesota partisan politics at all levels was the subject of testimony before, and extensive findings of fact by, the District Court in McRae v. Califano, 491 F.Supp. 630, 716-22 (E.D.N.Y.), rev'd on other grounds sub

[Footnote 9 continued from previous page]
Time, Sept. 10, 1984, at 8, col. 1.

Church officials also were active in local elections in 1984. Bishop Thomas Welsh of the Diocese of Allentown (Pa.), for example, gave Representative Don Ritter "a clear and unqualified endorsement" in his re-election campaign. The Globe-Times (Bethlehem, Pa.), Jan. 24, 1984, at A-6.

nom. Harris v. McRae, 448 U.S. 297
(1980).

Despite all the national publicity, the judicial findings and the information provided directly to the IRS, the IRS has never taken any steps to enforce the law, to revoke or suspend the Church's tax-exemption or to implement any other preventative or enforcement measures against the Church for its numerous, notorious and clear-cut violations of § 501(c)(3).
(J.A. 13-14)¹⁰

10/Indeed, the violations of law have been so flagrant that even some Church officials expected IRS enforcement action. For example (according to documents produced pursuant to a deposition subpoena duces tecum issued by respondents below), following the publication of the editorial endorsing Ronald Reagan in the official San Antonio, Texas Archdiocese newspaper under the headline, "To the IRS--'NUTS!!!'", the Archbishop of San Antonio wrote to petitioner USCC asking for assistance:

The editor of our official newspaper, TODAY'S CATHOLIC, in an editorial, proceeded to challenge the Internal Revenue Service. The editorial was picked up by a good number of periodicals, Catholic as
[Footnote 10 continued on next page]

Not all religious groups have been treated by the IRS as favorably as the Catholic Church. In one well-publicized case that occurred before the filing of this action, the IRS suspended the tax-exempt status of a Protestant journal for publishing editorials endorsing a candidate, in much the same manner as the San Antonio Archdiocese paper. The Christian Century, a weekly magazine published by a non-profit foundation, published three editorials in July and September 1964

[Footnote 10 continued from previous page]
well as dailies, throughout the country. I think it was rather offensive to IRS and I don't think they are going to keep quiet.

(Letter from Most Rev. P. F. Flores, Archbishop of San Antonio, to Legal Department, USCC, July 10, 1980)

Archbishop Flores need not have been concerned, however. There was no communication of any sort, formal or informal, from the IRS to the Archdiocese or the Archbishop concerning the editorial. (Letter from Thomas Drought, Esq., counsel to the Archdiocese, to Mark J. Cannan, Esq., respondents' counsel, Aug. 1, 1984; see also N.Y. Times, Aug. 16, 1981, at 49, col. 2)

supporting a candidate in that year's presidential election. The IRS "withdrew" the tax-exempt status of the foundation for three years for "violat[ing] Section 501(c)(3) because of political activities." (Letter from IRS District Director to Christian Century Foundation, Oct. 19, 1967; see "2 Church Journals Face Tax Inquiry," N.Y. Times, May 16, 1966.)

Proceedings Below

The response to the amended complaint by both the government and petitioners -- they have acted as one for most purposes -- has been a tenacious and single-minded effort to avoid consideration of the merits, even to the extent of a studied and premeditated act in contempt of court. The instant proceedings are the culmination of a relentless series of motions, petitions and appeals taken in lockstep by petitioners and the government, all seeking the same relief:

the dismissal of the complaint on jurisdictional grounds.

After the amended complaint was filed, the government and the petitioners, who were then defendants, moved to dismiss on the ground, among others, that respondents lacked standing to sue. (J.A. 20-23) In its July 1982 opinion deciding the motion (Pet. App. 54a-92a, reported at 544 F.Supp 471 (S.D.N.Y. 1982)), the District Court for the Southern District of New York upheld the standing of twenty-four plaintiffs as clergy members, voters and organizations whose members are voters, to assert certain claims against the government. (Pet. App. 55a-79a, 91a)¹¹

¹¹/The District Court dismissed the amended complaint in its entirety against the USCC and the NCCB for failure to state a claim against those two bodies (Pet. App. 83a-84a), and also dismissed the claim for a declaratory judgment against the government. (Pet. App. 89a-91a) In addition, the District Court dismissed five plaintiffs, all health care
[Footnote 11 continued on next page]

The government moved for certification of an interlocutory appeal of the District Court's decision under 28 U.S.C. § 1292(b). Although no longer parties, petitioners joined in the motion. (Pet. App. 46a) The request was denied. (J.A. 2, reported at 552 F.Supp. 364 (S.D.N.Y. 1982))

Early in 1983, the government and respondents served separate deposition subpoenas duces tecum on petitioners.¹²

[Footnote 11 continued from previous page]
facilities offering abortions, for lack of standing. (Pet. App. 67a, 91a) Three more plaintiffs were subsequently dismissed by stipulation of the parties in March 1986. (J.A. 4)

12/Respondents asked for documents relating to the adoption and implementation of portions of petitioners' 1975 Pastoral Plan for Pro-Life Activities, particularly the section dealing with congressional district committees, the names and addresses of Catholic officials responsible for pro-life activities, financial support for and other contact with political candidates and certain identified "right to life" committees, and communications with the IRS and others concerning the Catholic Church's tax-exempt status
[Footnote 12 continued on next page]

Petitioners began a series of maneuvers to forestall discovery and obtain appellate review of the District Court's interlocutory order denying the motion to dismiss. First, petitioners moved to quash the subpoenas in the Southern District of New York realleging lack of subject matter jurisdiction (standing). The motion was denied and production ordered on April 3, 1984. (J.A. 80) No discovery was had, however, as petitioners refused to produce any documents until after this Court's decision in Allen v. Wright, which was then pending. (Pet. App. 46a)

After Allen was decided, 468 U.S. 737 (1984), the government renewed its

[Footnote 12 continued from previous page]
and its compliance with the anti-electioneering provisions of § 501(c)(3). (J.A. 67-79)

The governments' subpoenas are reproduced at C.A. App. A 150-59 and C.A. App. A 529-33. The government has apparently done nothing to secure compliance with its subpoenas.

motion to dismiss for lack of standing. Petitioners once again submitted an amicus brief in support of government's position. (J.A. 2) The District Court denied the motion in February 1985. (Pet. App. 93a-102a, reported at 603 F.Supp. 970 (S.D.N.Y. 1985)). The government again requested certification under 28 U.S.C. § 1292(b), which was denied. (J.A. 3; C.A. App. A 243-46)

In the summer of 1985 -- more than two years after the service of the subpoenas -- petitioners still had not produced any documents and respondents moved to hold them in contempt. (J.A. 3) Petitioners cross-moved for a protective order, expressing concern about the scope of the subpoenas under the First Amendment and asking for a further delay of production pending the filing of the government's anticipated petition for mandamus. (J.A. 3; C.A. App. A 238-50)

The District Court, in its September 5, 1985 order (J.A. 81-82), reviewed the subpoenas, found that two portions of respondents' subpoenas "could conceivably trench on First Amendment considerations" (J. A. 81), and ruled that no documents need be produced under those two sections at that time.¹³ The District Court denied the other objections raised by petitioners and "ordered [them] to comply with the subpoena forthwith." (J.A. 82)

Before there was any production, however, the government filed a petition in the Court of Appeals for a writ of prohibition or mandamus to overturn the District Court's decisions on standing. Petitioners, who submitted an amicus brief in support of the petition, persuaded the District Court to postpone pro-

¹³/These two sections of the subpoenas, requests no.2 and 8a (J.A. 70-71) calling for minutes of internal church meetings, have been withdrawn by respondents in light of the District Court's order.

duction of documents until the petition was decided. (J.A. 83-84)¹⁴

The government's mandamus petition was denied by the Court of Appeals, without opinion, on January 14, 1986. In re Baker, 788 F.2d 3 (2d Cir. 1986) (table).¹⁵

On February 26, 1986, the District Court ordered document production to take place on March 7. (J.A. 87) Petitioners, however, despite the Second Circuit's refusal to disturb the District Court's decisions on standing, despite the surgery performed on the subpoenas by the District Court to meet petitioners'

14/At the same time, while the mandamus petition was pending, the District Court resolved petitioners' remaining objections to the subpoenas including the confidentiality of certain records. (J.A. 83-84) A protective order, agreed to by petitioners, respondents and the government, was entered by stipulation on February 4, 1986. (J.A. 85-86; C.A. App. A 268-76)

15/The government's petition for rehearing and suggestion for rehearing en banc were denied on March 3, 1986. (C.A. App. A 281)

objections, and despite the negotiation and entry of a confidentiality order acceptable to them, still refused to produce their documents. (J.A. 94, 102)

But by this time the District Court's patience with petitioners had reached its limit. In its May 8 and 9, 1986 orders (Pet. App. 44a-53a)¹⁶ -- the orders which are under review here -- the District Court held petitioners in contempt for willfully refusing to produce documents. The Court found that petitioners "did more than fail to be forthright with the court. They began to engage the court and the plaintiffs in a series of maneuvers that -- given [petitioners'] apparent intention of ultimate non-compliance -- made a game of the judicial process." (Pet. App. 47a)

Concluding that petitioners had "willfully misled the Court and the

¹⁶/The May 8, 1986 order is reported at 110 F.R.D. 337 (S.D.N.Y. 1986).

plaintiffs and ha[d] made a travesty of the court process" (Pet. App. 44a-45a), the District Court imposed sanctions of \$50,000 a day on each entity until the documents were produced, and also awarded respondents attorneys fees for certain aspects of the contempt proceedings. (Pet. App. 51a-53a)¹⁷

Petitioners appealed to the Court of Appeals for the Second Circuit. This time the government submitted briefs and argued in support of the petitioner's position in the Court of Appeals.¹⁸

¹⁷/The fine has been stayed pending the determination of this appeal. (Pet. App. 52a-53a; 105a-110a)

¹⁸/While the appeal below was pending in the Court of Appeals, the government sought to have this Court review the Second Circuit's denial of its mandamus petition. The government filed petitions for a writ of certiorari (No. 86-157) and for a writ of mandamus or prohibition (No. 86-162) in this Court for the same relief the government had sought and petitioners were then seeking in the Court of Appeals -- the reversal of the District Court's interlocutory decisions upholding respondents'

[Footnote 18 continued on next page]

The Court of Appeals affirmed the District Court's contempt citation. (Pet. App. 1a-43a, reported at 824 F.2d 156 (2d Cir. 1987)) Relying on the rule against interlocutory appeals and this Court's decision in Blair v. United States, 250 U.S. 273 (1919), Judge Newman, writing for the majority, held that as non-party witnesses the USCC and the NCCB

may make only the limited challenge as to whether there exists a colorable basis for exercising subject matter jurisdiction, and not a full-scale challenge to the correctness of the district court's exercise of such jurisdiction.

(Pet. App. 10a) After reviewing the allegations supporting respondents' standing, the majority concluded that "the District Court cannot be said to be usurping power in determining that sub-

[Footnote 18 continued from previous page]
standing to sue. The Court denied both petitions on October 6, 1986.

ject matter jurisdiction exists." (Pet. App. 19a)¹⁹

As was the case in the Court of Appeals, petitioners do not deny that they are in contempt and do not raise any objections to the subpoenas or District Court orders addressed to the subpoenas.

The sole ground advanced by petitioners -- and the government -- in their respective appeals and petitions to the Court of Appeals and this Court is that since respondents do not have standing to bring the lawsuit, the District Court does not have subject matter jurisdiction to entertain the action. The Court of Appeals affirmed the District Court and

¹⁹/Judge Kearse concurred in the majority opinion and added an additional ground to support it: discovery is appropriate to assist in gathering proof on the question of plaintiffs' standing. (Pet. App. 42a-43a) Judge Cardamone dissented from the judgment of the Court of Appeals addressing only the scope of appellate review. His opinion is silent on respondents' standing. (Pet. App. 21a-41a)

denied petitioners' appeal. Both this Court and the Court of Appeals denied the government's mandamus petitions. This Court should similarly reject this appeal.

Summary of Argument

I. The threshold issue in this case is not, as petitioners would have it, whether a court without jurisdiction can act. Rather, the question before the Court is whether and when a district court's determination that it has subject matter jurisdiction can properly be challenged on appeal.

There is no rule more fundamental to federal appellate practice than the one limiting appeals from the district court to final orders and decrees. This policy originated in the Judiciary Act of 1789 and is the "'dominant rule in federal appellate practice.'" DiBella v. United

States, 369 U.S. 121, 126 (1962). The rule against interlocutory appeals protects against against piecemeal litigation, "involves the important purpose of promoting efficient judicial administration" and reflects "the deference that appellate courts owe to the trial judge" Firestone Tire Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981).

Courts have created only limited exceptions to this fundamental rule for the small class of issues that are both separable from the underlying action and also concern important rights and fundamental interests that would otherwise be denied review. One such exception permits non-party witnesses to appeal a civil contempt citation. But the reason for allowing such an appeal limits its scope: the appeal affords the witness immediate review only of those issues that are important to him (such as privilege, personal jurisdiction, and the

like), but remain separate from those raised in the main action. See Blair v. United States, 250 U.S. 273, 281-83 (1919).

Petitioners do not challenge the content or scope of respondents' demands for discovery or claim injury to any other personal rights. Instead, petitioners seek review exclusively of prior denials by the District Court of motions to dismiss in which the Court concluded that it had subject matter jurisdiction over the underlying action.

No court has permitted what petitioners attempt to do here. Were petitioners to prevail, any nonparty witness, with or without the collusion of a party to the action, would be able to bring any case to an abrupt halt simply by refusing to give evidence, being held in contempt (with sanctions stayed) and then challenging on appeal the subject matter jurisdiction of the underlying action.

Because no prior determination would be binding upon such a witness, and because witnesses in different states would be able to raise the jurisdiction question in different districts and circuits, petitioners' position raises the spectre of constant re-litigation and multiple inconsistent rulings on the same issue in the same case.

Petitioners' only alleged injury is that they must comply with a discovery order. The burden for a non-party witness of giving testimony is, however, a duty of citizenship necessary for orderly judicial administration. The hardship imposed on a defendant of having to appear and defend an action through trial is much greater, but is still insufficient to create a right to interlocutory review of an adverse ruling sustaining subject matter jurisdiction. A fortiori, the much lighter burden imposed upon a

witness should not create a right greater than that given to the party.

II. Petitioners may not bring an interlocutory challenge to the standing of the respondents to maintain this action. Even if this Court does decide to review the issue of standing, it should affirm the District Court's contempt order. As the District Court properly found, respondents satisfy both the constitutional and the prudential requirements for standing.

Organizations exempt from taxation under 26 U.S.C. § 501(c)(3) are prohibited from engaging in partisan political activities. Respondents allege that the IRS has exempted the Catholic Church from this statute permitting the Church freely to support or oppose candidates for public office, depending on their views concerning abortion. The exemption is the equivalent of a subsidy or cash grant for one church's political activities and

violates both the Internal Revenue Code and the Establishment Clause. This government-created harm injures respondents in various ways.

Clergy respondents include members of the clergy active in the public debate on abortion but whose religious beliefs on this issue differ from those of the Catholic Church. The IRS injures the clergy in the furtherance of their ministries by subsidizing and tacitly endorsing the political activities of their Catholic counterparts active in the same communities and the same public debate.

Respondents also include individuals who are actively involved in the political process as voters, campaign contributors, and political candidates. These respondents are directly injured, economically as well as in other ways, by the distortion in the political process caused by the government's subsidy of

only one participant in the political debate, the Church. For these respondents, as well as for clergy respondents, the injury flows directly from the government's unconstitutional religious favoritism that tilts the political and spiritual playing field. Respondents' injuries can be remedied by a court order restoring the neutrality required by the Constitution.

Prudential considerations do not weigh against a finding of standing. Unlike Allen v. Wright, 468 U.S. 737 (1984) and other cases, this case involves, not abstract concerns shared by all, but direct personal injuries flowing from nonenforcement of a specific provision of the tax code against a single religion.

Resolution of respondents' claims does not require large-scale judicial intervention in the discretionary manner in which the executive branch conducts

its business. The command of the statute is clear and the violation complained of is specific and well documented. The IRS does not have discretion to violate the Constitution. This Court, moreover, has long recognized that the judiciary has an affirmative duty to protect individuals whose fundamental constitutional rights have been violated.

Argument

I.

**The District Court's Refusal to
Dismiss For Lack of Jurisdiction
Is Not Appealable.**

The threshold question presented here is whether a non-party witness, by disobeying an order to comply with a subpoena and appealing the ensuing contempt order, can obtain appellate review of a district court's refusal to dismiss

the underlying action for lack of subject matter jurisdiction.

Petitioners argue that appellate review must be available, notwithstanding that a decision upholding jurisdiction is interlocutory, because a court without jurisdiction has no power to enforce a subpoena. But this argument is a non sequitur. That a court without jurisdiction lacks judicial power may be a truism, but it says nothing at all about if, when or by whom a trial court's decisions are appealable. An interlocutory decision does not become appealable -- by a party or a non-party witness -- simply because the issue raised is one of subject matter jurisdiction.

Neither, of course, can petitioners challenge the District Court's jurisdiction of the underlying action as a kind of volunteer monitor of the judiciary's adherence to correct jurisdictional principles. They must assert an interest of

their own that can be vindicated on the appeal. But petitioners are strangers to this lawsuit; they are not parties and have no legal interest in the case except by virtue of the compulsion they are under to comply with the District Court's discovery order. Thus there is simply nothing here to be appealed unless that order violates some right or immunity of petitioners.

Petitioners identify no such violation. They raise on appeal no objection whatsoever to the order itself. They do not challenge the court's personal jurisdiction over them or the propriety of the discovery under the Federal Rules of Civil Procedure. They do not claim a violation of the First Amendment, of any testimonial privilege, of due process, or of any other right or immunity, constitutional or otherwise.

Indeed, the only "right" that petitioners have asserted and can possibly

vindicate on this appeal is that of immediate appellate review of the District Court's ruling on standing. As a matter of form, petitioners' appeal is from the contempt order, but in substance it is indistinguishable from a direct appeal of the District Court's denial of the government's motions to dismiss.

Petitioners have not cited, and respondents have not found, a single case permitting an appeal in these circumstances. On the contrary, the relevant precedent squarely rejects petitioners' argument. A district court's denial of a motion to dismiss is not appealable, by parties or non-parties, and the result is not changed merely because the would-be appellants are non-parties who happen to be in contempt of a court order enforcing a subpoena.

**A. The District Court's Jurisdiction
in the Underlying Action Is Not
an Issue in Which Petitioners
Have an Interest.**

It has long been clear that a recalcitrant witness cannot excuse a refusal to give evidence by challenging the jurisdiction of the court. This Court so held nearly seventy years ago in rejecting the challenge of a witness to the jurisdiction of a court and a grand jury over the subject matter of the inquiry:

[T]he giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government . . . , is subject to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself . . . ; some confidential matters are shielded, from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.

But, aside from exceptions and qualifications, -- and none such is asserted in the present case, -- the witness is bound not only to attend, but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.

He is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his

On familiar principles, he is not entitled to challenge the authority of the court or of the grand jury, provided they have a de facto existence and organization.

. . . In truth it is, in the ordinary case, no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not.

Blair v. United States, 250 U.S. 273, 281-83 (1919) (citations omitted)

(emphasis added). As the Court of Appeals rightly held, the decision in Blair is controlling here and requires the rejection of petitioners' appeal.

Petitioners seek to distinguish Blair on the ground that the court order in that case was issued pursuant to a grand jury investigation, which is not

subject to Article III limitations. But, as the Court of Appeals recognized, Blair does not rest solely -- or even primarily -- on the inherent investigatory powers of a grand jury. Its broad language states "a rule of wider application" (Pet. App. 10a) arising from the fundamental principle that a person may litigate only those issues that are of "concern" or interest to him.

In this context, that principle means that a witness seeking to excuse his noncompliance with a subpoena is confined to such matters as privilege, burden or other "special reasons" affecting him individually. Other issues are simply of "no concern" to him. 250 U.S. at 283.²⁰

²⁰/Maness v. Meyers, 419 U.S. 449 (1975), cited by petitioners (Brief for Petitioners ["Pet. Br."], 23), is not to the contrary. In that case the appellant asserted a Fifth Amendment privilege that might be irreparably compromised by compliance. 419 U.S. at 462 and n.10. Petitioners, [Footnote 20 continued on next page]

Having to give testimony or produce documents may, of course, be "onerous at times." 250 U.S. at 281. A party compelled to defend a lawsuit commonly bears much greater burdens, however, and these burdens have been squarely rejected as a reason to permit appeals from a non-final order. Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383 (1953).

The rules governing discovery, moreover, provide safeguards against abuse. For example, witnesses can be subpoenaed only where they live. Fed. R. Civ. P. 45. The courts are given broad power to protect against "annoyance, embarrass-

[Footnote 20 continued from previous page]
however, identify no protected interest of their own that is threatened by the court's order. Of course, one cannot "unring the bell," id. at 460, once privileged information is released, but petitioners have not attacked the subpoenas on grounds of privilege or any other ground related to the discovery sought, and thus have not identified any "bell" that would be rung by compliance.

ment, oppression, or undue burden or expense," Fed. R. Civ. P. 26(c), and judges are sensitive to the hardships imposed on witnesses.²¹

There will generally remain, of course, a residue of inconvenience. That is simply an unavoidable consequence of the "public obligation to provide evidence," Hurtado v. United States, 410 U.S. 578, 589 (1973), an obligation imposed upon all citizens as essential to the functioning of the judicial system in a law-abiding society. Just as the

²¹/Petitioners themselves are the beneficiaries of several protective orders issued by the District Court, including one protecting confidential documents. Indeed, it was precisely the inconsistent action of the petitioners in seeking relief from -- and taking the time and energy of -- the very court whose power to act they now deny that prompted the severity of the contempt sanction against them. Had petitioners been forthright with Judge Carter about their intentions, the sanctions would have been minimal and this appeal could have been brought and considered at the same time as the government's petition for mandamus in 1985. (Pet. App. 47a-49a)

greater burden of defending a lawsuit does not warrant an exception to the rule against interlocutory appeals, so too the less consequential burden of a subpoena does not entitle a witness to interrupt an ongoing litigation to challenge on appeal the court's jurisdiction to entertain the action.²²

As the Court of Appeals rightly reasoned, United States v. United Mine Workers, 330 U.S. 258 (1947), does not require a contrary result. Indeed, no case stands more clearly for the principle, in the words of the Court of

²²/That petitioners may be concerned about the outcome of the case does not alter the situation. If those concerns amount to a legal interest in this action, petitioners may ensure appellate review of the standing issue by intervening, before or after judgment, and appealing any judgment in favor of respondents. Certainly a concern not amounting to a basis for intervention as a party should not be the basis for the grant of greater power to raise jurisdictional issues on appeal than that possessed by a party.

Appeals, that "the orderly processes of the courts must be observed even if it is subsequently determined by an appellate court that the trial court lacked subject matter jurisdiction." (Pet. App. 13a)

In Mine Workers the jurisdictional challenge was to the power of the district court to issue the particular kind of order -- specifically, an injunction against striking -- for violation of which the appellants were found in contempt. On appeal the lower court's jurisdiction to issue that kind of order was naturally an issue that could properly be raised.

In this case, however, the Federal Rules of Civil Procedure explicitly authorize the issuance of deposition subpoenas (Rule 45) and orders to enforce them (Rules 26, 37 and 45). Thus, the question of subject matter jurisdiction does not relate to the orders themselves, as it did to the injunctions in Mine

Workers, but solely to the underlying action.

There is nothing in the Mine Workers opinion to suggest that the appellants there could have used the appeal from their contempt orders as an occasion to challenge the jurisdiction of the district court over the underlying action for a declaratory judgment. Certainly Mine Workers is not authority for the notion that a witness, who is burdened by no injunction against otherwise lawful activity, but has merely been called upon to discharge his "public obligation to provide evidence," Hurtado v. United States, 410 U.S. at 589, can bring any case in the federal court system to an abrupt halt merely by disobeying a subpoena.²³

²³/The distinction in Mine Workers between civil and criminal contempt is also unavailing to petitioners. There the Court noted that, unlike fines for criminal contempt, those for civil court's jurisdiction may be presented [Footnote 23 continued on next page]

B. The Rule Against Interlocutory Appeals Makes No Exception for Jurisdictional Challenges.

The reason that no case has allowed review of subject matter jurisdiction in circumstances like those of this action is that such a holding would be fundamen-

[Footnote 23 continued from previous page]
for review. In contrast to Mine Workers, there is no likelihood in this case that respondents would profit from any fine paid if subject matter jurisdiction is ultimately found lacking. At the May 9, 1986 hearing on petitioners' request for a stay of the contempt sanction, Judge Carter orally directed that the fine be paid to the United States Treasury and not to respondents. As the Court of Appeals noted, the ultimate disposition of a fine, if any is paid, is not at issue. (Pet. App. 14a-15a)

Of the other cases cited by petitioners, only one, *Ex parte Fisk*, 113 U.S. 713 (1885), concerns an interlocutory order remotely comparable to that at issue here. But in Fisk as in Mine Workers the challenge was not to the court's jurisdiction over the underlying case but to its power to issue the particular kind of order for the violation of which the appellant had been held in contempt. In Fisk it was an order to attend an examination before trial, which in the days before modern discovery practice the district court was not authorized to issue.

tally inconsistent with the rule against interlocutory appeals.

There is no rule more fundamental to federal appellate practice than the one limiting appeals from the district court to "final decisions." 28 U.S.C. § 1291. The rule reflects much more than "merely technical conceptions of 'finality.'" It is [a policy] against piecemeal litigation." Catlin v. United States, 324 U.S. 229, 233-34 (1945). As this Court has held:

Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.

Cobbledick v. United States, 309 U.S.

323, 325 (1940).²⁴

There is no constitutional right to an appeal. United States v. MacCollom, 426 U.S. 317, 323 (1976). Being a matter of legislative "grace," the availability of appellate review is strictly subject to the requirement of finality imposed by the enabling legislation. There is no exception for appeals asserting a lack of

²⁴/As this Court has more recently stated, the rule against interlocutory appeals "serves a number of important purposes" in addition to those expressed in Cobbledick, to wit:

It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. . . . The rule also serves the important purpose of promoting judicial administration.

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981).

subject matter jurisdiction. "[D]enial of a motion to dismiss, even when the motion is based on jurisdictional grounds, is not immediately reviewable." Catlin v. United States, 324 U.S. at 236.

That an order issued without jurisdiction will be vacated on a proper appeal does not render appealable every order that some would-be appellant claims was issued without jurisdiction. Petitioners' notion that an appellate court "is bound" to consider the district court's jurisdiction whenever "anyone" suggests that it do so (Pet. Br. 22) is simply wrong. Indeed, if petitioners were correct, no petition for mandamus asserting a challenge to the district court's jurisdiction could ever be denied without a full consideration of the jurisdictional issue, a proposition disproved by the denials in both the Court

of Appeals and this Court of petitions for mandamus in this case.²⁵

Notwithstanding the heavy reliance they place on it, Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986), offers petitioners no comfort in this regard. On the contrary, what Bender holds is that "[o]n every writ of error or appeal, the first and fundamental question is that of jurisdiction, first,

25/A petition for a writ of mandamus or prohibition raising jurisdictional issues is treated like any other petition for an extraordinary writ. No special rules apply:

[A]ppellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal.

Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). Nothing less than "a usurpation of power" will warrant mandamus. Pfizer, Inc. v. Lord, 522 F.2d 612, 615 (8th Cir. 1975), cert. denied sub nom. Government of India v. Pfizer, Inc. 424 U.S. 950 (1976); American Airlines, Inc. v. Forman, 204 F.2d 230, 232 (3rd Cir.), cert. denied, 349 U.S. 806 (1953).

of this court, and then of the court from which the record comes" 475 U.S. at 547 (emphasis added). Bender does not establish the automatic appealability of any challenge to the jurisdiction of a district court; it teaches, rather, that the threshold issue on any appeal is appellate jurisdiction.

In Bender the Court held that someone not a party to the action has no standing to appeal from a final judgment. Surely petitioners do not mean to suggest that the result would have been different -- i.e., that the appeal would have been entertained -- if the would-be appellant had challenged the decision of the district court on jurisdictional grounds rather than on the merits. Yet that is what necessarily follows from their assertion -- citing Bender -- that the jurisdiction of the district court "must be examined on this appeal." (Pet. Br. 22 n.11) (emphasis added)

Of course, it is true that a civil contempt order is generally appealable by a non-party contemnor prior to final judgment in the main action, United States v. Ryan, 402 U.S. 530 (1971), but the reasons for this exception to the final judgment rule also delimit its scope. Contempt orders are examples of "that small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action" Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).

They are appealable, in other words, because of their separable, collateral nature, which allows the appeal to proceed without unduly interfering with the progress of the underlying lawsuit. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374-75 (1981). Cf. International Business Machines Corp. v. United States, 493 F.2d 112, 115 n.1 (2d

Cir. 1973), cert. denied, 416 U.S. 995 (1974). These considerations plainly do not justify extending the exception to include an appeal, by either a party or a non-party, which simply seeks to gain appellate review of an otherwise nonappealable interlocutory order that is inseparable from the issues raised in the underlying action.

C. The Standard of Review Adopted By the Court of Appeals Is Correct.

To permit collateral attacks on jurisdiction by non-party witnesses would have devastating consequences on the ability of the district courts to enforce their orders and to manage the flow of litigation. At any time, a non-party witness could bring a lawsuit to a halt, simply by challenging the court's jurisdiction to entertain the action. Because the witness would not be bound by any prior ruling on the subject, that the

district court had already examined its jurisdiction would count for naught.

If a subpoena were issued by a district court other than the one in which the action was pending, the witness could insist that his challenge be ruled on by the issuing court. Fed. R. Civ. P.

45(d). Non-party witnesses could thus force the parties to re-litigate jurisdictional questions in as many courts as issued subpoenas, raising the possibility of multiple inconsistent jurisdictional rulings by district courts or even by courts of appeals in the same case.²⁶ In

²⁶/The subpoenas in this case, for example, were issued by the District Court for the District of Columbia (J.A. 76-79), where petitioners are headquartered. Petitioners chose to keep the proceedings in the Southern District of New York, where the action is pending, by moving in that District for a protective order pursuant to Fed. R. Civ. P. 26(c). Had they chosen instead to serve objections to the subpoena under Rule 45(d)(1), a motion to compel could have been brought only in the District of Columbia, *id.*, and an appeal from any ensuing order of contempt would have [Footnote 26 continued on next page]

any case that presented a close question as to subject matter jurisdiction, no party could be sure of his ability to obtain evidence by subpoena -- and no trial court could be sure of its ability to proceed to trial -- until this Court had ruled.

Adoption of petitioners' argument would be an open invitation to collusion between parties and friendly non-party witnesses to secure expedited review of jurisdictional rulings. Because civil contempt can be purged at any time by compliance and courts appear willing to grant stays of enforcement pending appeal, there would be no real risk to such disobedience. The result would be a gaping hole in the rule against interlocutory appeals and serious damage to

[Footnote 26 continued from previous page] been brought in the District of Columbia Court of Appeals. In re Corrugated Antitrust Litigation, 620 F.2d 1086 (5th Cir. 1980).

its underlying policies of "deference . . . to the trial judge" and "promoti[on] of judicial administration."

Firestone Tire & Rubber Co. v. Risjord,
449 U.S. 368, 374 (1981).

Indeed, this case provides an excellent example of how the appeal from a contempt order can be used to circumvent the rule. First, the government, with petitioners' support as amici in the District Court and the Court of Appeals, unsuccessfully attempted to obtain appellate review of the denial of the motions to dismiss.²⁷ Petitioners, in the meantime, sought and agreed to a protective order, naturally leading the District Court to believe that, if the government's efforts failed, the documents would be produced. The government's

²⁷/The government twice sought certification under 28 U.S.C. § 1292(b) and petitioned for a writ of mandamus both in the Court of Appeals and in this Court.

failure, however, was merely the signal for petitioners to delay discovery further by seeking the identical relief.

As noted above, petitioners concede that their "sole" consideration in disobeying the discovery order was to get the District Court's prior ruling on standing "overturned on appeal." (J.A. 103) The government likewise acknowledges that petitioners' argument is essentially a replay of its own petitions for mandamus. The only difference, according to the government, is that now the issue is presented "in a direct appeal that is not burdened by the restrictions that attend the issuance of an extraordinary writ."²⁸ This position, if accepted, would create a new class of final orders in any case where jurisdiction is an issue and the defendant can

²⁸/Brief for the Federal Respondents in Support of Petition, 7.

persuade just one non-party witness, who takes no real risk, to defy a subpoena.²⁹

To preserve the rule against interlocutory appeals, the Court of Appeals in this case wisely applied to the District Court's determination the same presumption of validity and minimal scrutiny appropriate to petitions for an extraordinary writ:

In the instant case, though the issue of subject matter jurisdiction over the underlying lawsuit is a substantial question, the District Court cannot be said to be usurping power in determining that subject matter jurisdiction exists.

²⁹/Regardless of whether there has been actual collusion between petitioners and the government, it can scarcely be denied that they are -- and see themselves as -- strongly allied in interest. Indeed, petitioners argue that they are "the real targets of the suit." (Pet. Br. 25) This case, therefore, falls within the rule that "a substantial congruence of interests" between a party and a non-party will bar the latter's appeal of a contempt order. In *Re State of Washington v. Standard Oil of California*, 747 F.2d 1303, 1305 (9th Cir. 1984), cert. denied, 471 U.S. 1100 (1984) (Kennedy, J.).

(Pet. App. 19a) (emphasis added)³⁰

The standard of review adopted by the Court of Appeals successfully reconciles jurisdictional concerns with the federal courts' strong policy against piecemeal appeals and should be approved by this Court.

The instant petition and the appeal below are indistinguishable from the government's prior petitions for the same relief. While the USCC and NCCB are now petitioners instead of amici, their arguments and their interest in the case are unchanged. The issue is the same; so should be the result.

³⁰/See cases cited at note 25, supra, and United States v. United Mine Workers, 330 U.S. at 309 (Frankfurter, J., concurring) (contempt upheld unless court was "merely usurping judicial forms and facilities"). As Judge Newman observed, a similar standard is also applied to a collateral attack on a judgment entered after litigation of subject matter jurisdiction. (Pet. App. 19a, citing Nemaizer v. Baker, 793 F.2d 58, 64-66 (2d Cir. 1986)).

II.

Respondents Have Standing To Sue.

As shown in the previous section, petitioners cannot mount a "full-scale challenge to the correctness of the district court's exercise of [subject matter] jurisdiction." (Pet. App. 10a) The appropriate standard for this Court's inquiry is limited to whether the District Court's retention of jurisdiction amounts to a "clear usurpation of judicial power." As the Court of Appeals correctly held, the answer is no. (Pet. App. 19a)³¹

Even if this Court chooses to inquire more deeply into the merits of the District Court's decision, the result

³¹/Indeed, as shown in Point I, supra, any other conclusion would appear to be foreclosed by this Court's refusal last Term to grant the government's petition for mandamus (No. 86-162) or to review the denial of mandamus by the Court of Appeals (No. 86-157).

should be the same: the District Court properly sustained the standing of both the clergy and the "voter" or "political participant" respondents.

The constitutional requirements for standing under Article III of the Constitution are easily stated. Their application, however, is another matter.³²

Grounded in the "case or controversy" provisions of Article III of the Constitution, the standing doctrine requires a plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751 (1984). In addition, the plaintiff

³²/As previously noted, the Court is required to accept as true all the material allegations of the amended complaint (J.A. 5-19) and the affidavits submitted by respondents in opposition to the motions (J.A. 28-66), and to construe these facts in the light most favorable to the respondents. See note 4 supra.

must satisfy "prudential" concerns which reflect "judicially self-imposed limits on the exercise of federal jurisdiction" under the separation of powers doctrine. Id.

Petitioners and the government (sometimes referred to collectively in this section as "petitioners") argue in various guises that the injuries alleged by respondents are not cognizable in law or sufficiently particularized or individualized to meet the injury in fact test, and that they are neither "fairly traceable" to the government's conduct nor "likely to be redressed by the requested relief." Petitioners also assert as grounds for dismissal the prudential limitation identified in Allen v. Wright "barring adjudication of generalized grievances more appropriately addressed in the representative branches." 468 U.S. at 751.

Petitioners, however, misconstrue the nature of respondents' injuries and ignore the fact that respondents' claims are founded upon constitutionally protected individual freedoms which the judiciary has long recognized it has a special duty to protect.

A. The Clergy Respondents Have Standing to Challenge an Establishment Clause Violation That Injures Them in the Practice of Their Ministries.

To confer standing, a plaintiff's injury must be "'distinct and palpable,'" Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979), and cannot be "'abstract' or 'conjectural' or hypothetical,'" Allen v. Wright, 468 U.S. 737, 751 (1984). It does not, however, have to be economic. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 486 (1982). The Court has repeatedly recognized that a wide range

of harms, including economic, aesthetic, environmental and spiritual, can constitute judicially cognizable injury in fact.³³

³³/See, e.g., *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. at 111-12 (denial of right to interracial association); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 73-74 (1978) (environmental and aesthetic consequences of pollution); *United States v. SCRAP*, 412 U.S. 669 (1973) and *Sierra Club v. Morton*, 405 U.S. 727 (1972) (diminution of aesthetic and environmental interests in enjoyment of natural resources); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 154 (1970) ("aesthetic, conservational and recreational" interests); *Abington School District v. Schempp*, 374 U.S. 203, 208-10 (1963) (spiritual values).

In *Allen v. Wright*, this Court reaffirmed that "stigmatizing injury" is the "sort of noneconomic injury [which] is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing." 468 U.S. at 755. The Court cited its unanimous decision in *Heckler v. Mathews*, 465 U.S. 728 (1984), where the Court stated that "discrimination itself, . . . by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause

[Footnote 33 continued on next page]

Indeed, this Court has specifically held that a spiritual injury may be sufficient to confer standing:

A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause.

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 154 (1970) (citing Abington School District v. Schempp, 374 U.S. 203 (1963)).³⁴

[Footnote 33 continued from previous page]
serious noneconomic injuries. . . ."
465 U.S. at 739-40 (citation omitted).

³⁴/Non-economic, spiritual injuries that personally affect a plaintiff have often been recognized as a basis for standing. See, e.g., American Civil Liberties Union v. City of St. Charles, 794 F.2d 265 (7th Cir.), cert. denied, 107 S.Ct. 458 (1986) (standing to challenge city's display of cross); Hawley v. City of Cleveland, 773 F.2d 736 (6th Cir. 1985), cert. denied, 106 S.Ct. 1266 (1986) (standing to challenge sectarian chapel at public airport); American Civil Liberties Union v. Rabun County Chamber of Commerce, 698 F.2d 1098 (11th Cir. 1983) (standing to challenge display of cross on state-owned property).

As the District Court found, the clergy respondents in this case suffer personal injury of the type recognized by this Court, as the direct result of the IRS' unconstitutional subsidy and tacit endorsement of the Catholic Church. (Pet. App. 67a-68a)

The District Court grouped under the rubric of "clergy plaintiffs" five clergy members who are active spiritual leaders, ordained as rabbis or ministers by their respective religious bodies and employed by tax-exempt religious congregations, and one tax-exempt religiously-based organization. They are:

--Rabbi Israel Margolies, a rabbi in New York City (J.A. 43-44) until his death in February 1988;

-- Reverend Beatrice Blair, an Episcopal minister in New York City (J.A. 45-47);

-- Rabbi Balfour Brickner, a rabbi in New York City (J.A. 48-50);

-- Reverend Robert Hare, a Presbyterian minister in Scarborough, New York (J.A. 51-52);

-- Reverend Marvin G. Lutz, a Presbyterian minister in Jacksonville, Florida, and the Women's Center for Reproductive Health, also of Jacksonville, held by the District Court to be an extension of Reverend Lutz's ministry. (J.A. 53-55; Pet. App. 68a)

Petitioners argue that because the clergy respondents do not complain of IRS action specifically directed against them, they have not alleged sufficient personal injury to satisfy the injury in fact requirement for standing. (Pet. Br. 33) This argument, however, entirely misconstrues the nature of respondents' claim.

Respondents' complaint arises under the Establishment Clause. That Clause prohibits government promotion of religion or discrimination among religions,

regardless of whether individuals are actually compelled to adhere to the beliefs endorsed by the government. In the words of Justice Black:

The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.

Engel v. Vitale, 370 U.S. 421, 430 (1962).

Injuries to freedoms guaranteed by the Establishment Clause are thus different from injuries caused by violations of most other constitutional rights. The latter usually involve some sort of direct governmental coercion or action against the individuals suing. In an Establishment Clause claim, on the other hand, the challenged governmental action is the preferential treatment of parties other than the plaintiff.

Thus, direct governmental coercion is not a necessary element of a violation of the Establishment Clause. The injury is the governmental endorsement or discrimination itself, because any "denominational preference," Larson v. Valente, 456 U.S. 228, -245 (1982), necessarily denigrates the beliefs of those who disagree with the official preferred religion.³⁵

Governmental discrimination among religions, which is the essence of clergy respondents' claim, is the purest form of an Establishment Clause violation. "The clearest command of the Establishment

³⁵/Justice O'Connor has described the nature of the injury in these terms:

Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.

Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (concurring opinion).

Clause is that one religious denomination cannot be officially preferred over another." Id. at 244. To ensure "that every denomination would be equally at liberty to exercise and propagate its beliefs," the First Amendment forbids governmental regulation creating "an atmosphere of official denominational preference." 456 U.S. at 245.

Thus, as the Court has held, "the requirements for standing to challenge state action under the Establishment Clause . . . do not include proof that [plaintiffs'] particular religious freedoms are infringed." Abington School District v. Schempp, 374 U.S. 203, 224 n.9 (1963). Plaintiffs need show only that they are "directly affected by the laws and practices against which their complaints are directed." Id.³⁶

³⁶/Cf. Warth v. Seldin, 422 U.S. 490, 505 (1975):

When a governmental prohibition or restriction imposed on one party
[Footnote 36 continued on next page]

That requirement is clearly satisfied here. Unlike the plaintiffs in Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982), the clergy respondents here do not rely on the abstract injury common to all citizens that results when the government acts illegally. Rather, clergy respondents claim that as a direct result of a specific government violation they personally suffer distinct and concrete injuries arising from their individual professional and personal situations.

The work of the clergy respondents includes ministering to the needs of their churches and congregations, as well as seeking acceptance in the community at

[Footnote 36 continued from previous page] causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights.

large for their particular religious ideals and beliefs.

The clergy respondents are members of religious institutions and denominations that do not share the Catholic Church's theological abhorrence of abortion, but believe that termination of pregnancy is justifiable in some circumstances. In furtherance of their ministries, respondents are active in the abortion rights movement but under § 501(c)(3) must refrain from engaging in partisan political activities which they could otherwise employ to "propagate [their] beliefs", Larson, 456 U.S. at 245, and obtain greater public approval or acceptance of their teachings.³⁷

³⁷/Engaging in these prohibited activities would lead to the loss of tax-exempt status under § 501(c)(3), and make it more expensive and difficult for respondents and their congregations to carry on their religious missions.

Their Catholic brethren, on the other hand, have no such restrictions placed on them. The IRS has allowed Catholic clergy to electioneer -- to employ the tools of partisan politics to promote their anti-abortion theology and otherwise to exploit their tax-exempt status in the political arena -- in ways that are forbidden to the clergy respondents. Thus, in the daily practice of respondents' ministries, in their abilities to gain public acceptance of their religious beliefs and to minister to their congregations' particular needs, the government has denied respondents access to the same tools -- tacit endorsement of and substantial cash subsidies for partisan political activities -- that the government bestows on Catholic clergy.³⁸

³⁸/The two most important benefits of tax-exempt status under § 501(c)(3) are that the organization itself is exempt from income tax and donations
[Footnote 38 continued on next page]

The injury can be graphically illustrated by comparing the differences created by the IRS between the clergy respondents and their Catholic brethren across town (or the town square) during political campaigns that affect them both, such as the New York 1976 senatorial campaign or the 1984 presidential campaign.³⁹

[Footnote 38 continued from previous page]
to the organization are deductible on the donor's income, estate and gift tax returns. 26 U.S.C. §§ 170, 2055, 2522. This Court has held that these are the equivalent of cash grants to the organization and the donor. *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983); see note 6, supra.

The additional benefits of § 501(c)(3) status are also substantial. See generally Houck, *With Charity For All*, 93 Yale L.J. 1415, 1429 (1984)

39/Petitioners misstate respondents' injury when they claim that this suit involves a "minister in New York . . . challenging the tax exemption of the Archdiocese of San Antonio, Texas." (Pet. Br. 35) Rather, the case concerns clergy, such as the ministers in New York, who claim that they have been injured in their local political

[Footnote 39 continued on next page]

The churches and synagogues that employ the New York clergy respondents, Rabbi Margolies, Rev. Blair, Rabbi Brickner and Rev. Hare, like Catholic churches in New York, are tax-exempt under section 501(c)(3), and donations to these organizations are deductible on the tax returns of the donors.

Abortion is an important issue for both the New York clergy respondents and their Catholic counterparts. Both, as part of their respective ministries, preach to their congregations and counsel individual congregants on questions relating to abortion. Respondents, like many Catholic clergy, are active participants in the public debate on abortion.⁴⁰

[Footnote 39 continued from previous page]
communities by the IRS' favoritism of another religious establishment in that same local community, as well as by favoritism of that religion nationwide.

⁴⁰/Rev. Blair, for example, at the time the amended complaint was filed, was chair of the board of National

[Footnote 40 continued on next page]

The IRS' discriminatory enforcement of § 501(c)(3), however, restricts how the New York clergy respondents, compared to their Catholic counterparts across town, may seek public acceptance of their position in elections in which abortion rights is a major issue. Catholic priests, for example, are allowed by the IRS to funnel Church funds to, or to solicit tax-deductible donations for candidates they support. Catholic clergy

[Footnote 40 continued from previous page]
Abortion Rights Action League ("NARAL") and a member of the board of the New York City Metro Religious Coalition for Abortion Rights. (J.A. 45) Rabbi Brickner, in addition to but separate from his religious affiliation, was at the time of the filing of the amended complaint chairman of the national issues committee of the New York State Liberal Party, which sponsors candidates for election to public office (J.A. 49), including the United States Senate and the Presidency. Rev. Hare at that time was president of Religious Leaders for Free Choice of Greater Metropolitan New York. (J.A. 51)

may turn their sermons or their public statements into political endorsements.⁴¹

Clergy respondents, on the other hand, cannot use or raise tax-favored dollars for the candidates they support. They cannot use the power of their pulpits to seek votes.

The government, in short, blesses the partisan political activities of Catholic clergy with subsidies, simultaneously refusing to permit the clergy respondents living in the same communities and participating in the same public debate, to employ the same techniques to

⁴¹/In 1976, the Catholic Church in New York, according to the amended complaint, "donated substantial sums" to a group promoting the senatorial campaign of James Buckley. (J.A. 13) In 1984, then Archbishop O'Connor of New York publicly criticized vice-presidential candidate Geraldine Ferraro's position on abortion, N.Y. Times, Sept. 10, 1984, at A1, col. 8, shortly after the Archbishop had publicly stated that Catholics could not in good conscience vote for candidates who supported abortion. N.Y. Times, Aug. 4, 1984, at A1, col. 3-4.

counteract the Catholic clergy's government-subsidized activities.⁴²

Thus respondents are unlike the plaintiffs in Allen v. Wright, who could not claim that they personally had been subjected to discrimination as a result of the government's policy. 468 U.S. at 746.

The difference between clergy respondents and the plaintiffs in Allen is made even more apparent when one examines the second and third elements of the

42/The engendering of "political division along religious lines is one of the principal evils" the Religion Clauses were adopted to prevent. Lemon v. Kurtzman, 403 U.S. 602, 622 (1971). In the words of Justice Harlan,

[G]overnmental involvement . . . may . . . engender a risk of politicizing religion. . . . [R]eligious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion. Yet history cautions that political fragmentation on sectarian lines must be guarded against.

Walz v. Tax Commission, 397 U.S. 664, 695 (1970) (Harlan, J., concurring).

standing test. In Allen, the Court held that plaintiffs' alternate ground for standing, that the government's actions had diminished their children's ability to attend racially integrated schools, was not "fairly traceable" to the challenged government conduct. The Court noted that it was "entirely speculative" whether a change in the government policy would increase the opportunity for plaintiffs' children to attend integrated schools. 468 U.S. at 757, 758.

By contrast, the clergy respondents here are personally denied the opportunity to engage in partisan political activity and to foster their respective religious missions with the same official status and on the same statutory terms and conditions as another tax-exempt religious entity. The injury is caused solely by a "specifically identifiable governmental violation of law," 468 U.S. at 759, namely the IRS' preference of the

Catholic Church over the clergy respondents. Injunctive relief requiring the IRS to end its preferential treatment of the Catholic Church will redress respondents' injury. Thenceforth, respondents and their Catholic brethren would be treated equally by the government. (Pet. App. 69a, 96a)⁴³

43/It does not matter that respondents seek to end the preferential treatment of the Catholic Church by removing the benefits given to the Church, rather than by procuring the benefits for themselves. This Court has recently reaffirmed that "the right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against." *Heckler v. Mathews*, 465 U.S. 728, 739 (1984). As Justice Brennan wrote for the Court, paraphrasing Justice Brandeis:

[W]hen the "right invoked is that of equal treatment," the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.

Id. at 740 (quoting *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931) (emphasis in original) (footnote omitted)).

Accordingly, the District Court's determination that the clergy respondents have standing to maintain this action is correct.⁴⁴

B. The "Political Participant" Respondents Have Standing to Challenge the Government's Distortion of the Political Process.

The second category of plaintiffs held by the District Court to have standing are the "political participant" respondents. They include the seventeen individual respondents (including the clergy respondents) and three tax-exempt organizations suing on behalf of their respective members. (Pet. App. 70a)⁴⁵

⁴⁴/As the arguments for redressability are similar for both classes of respondents, the discussion of redressability that appears in the section on "voter" respondents, *infra* at 89-95, should be read as applicable to clergy respondents as well.

⁴⁵/The organizations are Abortion Rights Mobilization, Inc. ("ARM"), National Women's Health Network, Inc. ("NWHN"), [Footnote 45 continued on next page]

The individual respondents reside or work in different parts of the country including areas where specific violations of § 501(c)(3) alleged in the amended complaint have occurred.⁴⁶

[Footnote 45 continued from previous page] and Long Island National Organization for Women-Nassau, Inc. ("Nassau-NOW"). The organizations are ARM and NWHN are both tax-exempt under § 501(c)(3). Nassau-NOW is tax-exempt under § 501(c)(4). The primary difference between a (c)(3) and a (c)(4) organization is that contributions to the former are tax deductible by the donor, while contributions to the latter are not, 26 U.S.C. § 170. Neither group may engage in partisan political activities. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii); see generally House Hearings 101-02 (exhibits to statement of Lawrence B. Gibbs, Commissioner of Internal Revenue).

46/The individual respondents live or work in New York City (J.A. 28, 35, 43, 45, 48) and State (J.A. 31, 51, 56, 57, 58, 63, 65), Massachusetts (J.A. 33), New Jersey (J.A. 43), Pittsburgh, Pennsylvania (J.A. 60, 61), and Florida (J.A. 53). ARM and NWHN are national organizations based in New York and Washington, D.C., respectively (J.A. 28, 37); Nassau-NOW is headquartered in Nassau County, New York. (J.A. 41)

All the individual respondents are voters, most of whom are active in the abortion rights movement. (J.A. 28-42, 45-55, 63-66) Several respondents are substantial contributors to political campaigns on behalf of pro-choice candidates (J.A. 31-36, 38-39, 48-50, 63-66) or contributors to tax-exempt organizations that support abortion rights but cannot and do not engage in electioneering (J.A. 31-36, 38-39, 63-66). Other respondents are Catholic laity opposed to the Church's illegal use of the contributions. (J.A. 56-62) One respondent (Brickner) was, at the time the lawsuit commenced, national issues director of a political party in New York State (J.A. 49-50), and one (DeCrow) was a former candidate for political office who anticipates running again. (J.A. 63-64)

In Baker v. Carr, 369 U.S. 186, 208 (1962), this Court recognized that those who "assert[] 'a plain, direct and

adequate interest in maintaining the effectiveness of their votes," state a cognizable injury upon which they have standing to sue. Such plaintiffs challenge governmental action that "plac[es] them in a position of constitutionally unjustifiable inequality vis-a-vis [favored] voters," id. at 207, and are "not merely [claiming] 'the right, possessed by every citizen, to require that the Government be administered according to the law,'" id. at 208.

In Reynolds v. Sims, 377 U.S. 533, 562 (1964), the Court noted that "the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." It is now accepted that "the substantive right to participate on an equal basis with other qualified voters [in the] electoral process," Lubin v. Panish, 415 U.S. 709, 713 (1974) (quoting San Antonio School District v. Rodriguez, 411 U.S. 1, 59 n.2 (1973))

(Stewart, J., concurring)), is a basic constitutional right, secured by the First and Fourteenth Amendments.

Anderson v. Celebrezze, 460 U.S. 780, 786 & n.7 (1983).

The political participant respondents state a cognizable violation of this fundamental right, namely, the distortion of the political process caused by the government's subsidy of the partisan political activities of one participant in the political process, the Catholic Church, but not others, including the respondents.

The government's actions make it much more expensive for respondents to donate money to political campaigns and much more difficult for them to raise funds from others, as compared to campaign contributors or candidates with Catholic Church backing. Because respondents' political contributions (or contributions to respondents' campaigns)

are not deductible, it costs respondents considerably more to give \$1,000 to a candidate, for example, than it costs a donor to make a similar contribution to a candidate by means of a tax-exempt, tax-deductible contribution to the Catholic Church. Candidates backed by the Church, therefore, can raise funds more easily than the respondents or the candidates they support.

Respondents are harmed further because the government permits the Catholic Church, but not respondents, to use the power and prestige arising from the Church's standing in the community to partisan advantage, and to employ the Church's organization and membership structure to support or oppose political candidates.⁴⁷

⁴⁷/That many people have suffered a similar injury does not negate the standing of one who has suffered a direct and personal injury. See United States v. SCRAP, 412 U.S. 669, 686 (1973); Sierra Club v. Morton, 405 [Footnote 47 continued on next page]

These injuries are caused, not by the partisan political activity of the Catholic Church, but by government action -- or, more accurately, inaction -- with respect to that political activity. Respondents' injuries can be eliminated by an order requiring the government to end its favoritism toward the Catholic Church, thus eliminating the government-caused distortion of the political process. If thereafter the Catholic Church continued to engage in partisan political activities, it would have to do so on the same basis as respondents -- that is, by foregoing its tax-exempt status and by financing such activities without tax-deductible dollars.

[Footnote 47 continued from previous page]
U.S. 727, 734-35 (1972). "[S]tanding principles do not require that a party be the most grievously injured, only that he be 'among the injured.'" Moore v. United States House of Representatives, 733 F.2d 946, 952 (D.C. Cir. 1984), cert. denied, 105 S.Ct. 779 (1985).

Respondents do not challenge the right of the Catholic Church to support candidates. They argue only that the government's support for and subsidy of Catholic Church electioneering activity is unlawful and unconstitutional. It is irrelevant, therefore, whether the Church will continue to be active politically or if its members will increase their donations. If the government applies to the Catholic Church the same standards regarding political use of tax-exempt, tax-deductible dollars as it applies to respondents, the governmentally caused arbitrary inequality of which respondents complain will have been eliminated.

Thus, neither Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976), nor Allen v. Wright, 468 U.S. 737 (1984), upon which petitioners rely, is on point. In Simon, plaintiffs' alleged injury was their inability, as indigent patients, to obtain hospital

services without charge. They could not show, however, that a change in the IRS regulations they challenged would result in a change in the hospitals' policies toward indigent patients, as those policies were determined by many factors, only one of which was before the Court. The Court, therefore, held that the respondents could not meet the causation or redressability requirements for standing.

In Allen, plaintiffs' injury was the diminished ability to obtain for their children racially integrated schooling. Because plaintiffs could not show that a change in the IRS policy would alter the segregated schools' admissions policies, which were determined independently, the line of causation between plaintiffs' injury and the challenged action was too attenuated to support standing.

In the case at bar, however, the injury to respondents is not the Catholic

Church's political activities per se, but the government's subsidy of those activities. If that tax benefit is removed -- by an order requiring equal enforcement of the tax code -- the cause of respondents' injury will also be removed.⁴⁸

The other cases relied upon by petitioners can also be distinguished on this basis. Respondents do not seek court interference with discretionary federal decisions nor are they concerned with the outcome of any particular election.⁴⁹

48/As the District Court held (Pet. App. 99a):

The judicially cognizable injury in Allen was segregated schooling which was neither created nor remediable by IRS action alone. The injury alleged in ARM is unequal footing in the political arena, a condition completely traceable and within the control of the IRS.

49/Unlike this case, the plaintiffs' evident purpose in Winpsinger v. Watson, 628 F.2d 133 (D.C. Cir.), cert. denied, 446 U.S. 929 (1980) was to secure the presidential nomination of their candidate. They also challenged virtually every

[Footnote 49 continued on next page]

Respondents ask only that the government's thumb be removed from the scales so that the electoral process can take place without discriminatory or unconstitutional governmental interference.

Political participant respondents, thus, are like the candidates and campaign contributors who were held to have standing to challenge portions of the congressional franking statute:

Plaintiffs respond by contending that regardless of electoral outcomes, the interest in a fair electoral process that they assert is directly affected by the defendants' actions under the franking statute.

[Footnote 49 continued from previous page] discretionary decision made by the executive branch. The requested relief here is the termination of a specific unconstitutional act of religious favoritism by the federal government -- not a particular electoral result. See *McMichael v. County of Napa*, 709 F.2d 1268, 1273 (9th Cir. 1983) (Kennedy, J., concurring) ("[T]he improper election procedure, whatever its effect on the outcome, forces participation in a constitutionally defective process. The appellant does have standing to make this argument.")

Moreover, plaintiffs allege that they suffer particularized harms distinct from those suffered by the citizenry at large. Under this characterization of the complaint, the causation requirements of the Warth [v. Seldin] and Winpisinger cases are not in issue, because the asserted harm is the franking statute and defendants' actions thereunder. There is no third party action here complicating the issue. Plaintiffs are directly harmed by defendants' actions.

Common Cause v. Bolger, 512 F.Supp. 26, 29 (D.D.C. 1980) (three-judge court) (emphasis in original).⁵⁰

Petitioners argument that the respondents' injury is not redressable

⁵⁰/Petitioners claim that a finding of standing in this case would open the door to a multitude of "competitive injury" standing suits is off the mark. (Pet. Br. 38) This case concerns the First Amendment requirement imposed by our Founding Fathers that government not distort the political process in favor of one religion over another. Recognition of standing for significant injuries to constitutional freedom does not in any way apply to claims of competitive economic injury such as those raised in American Society of Travel Agents v. Blumenthal, 566 F.2d 145 (D.C. Cir. 1977), cert. denied, 435 U.S. 947 (1978).

because petitioners, who are not parties to this action and therefore not bound by its outcome, can later challenge any action taken against them by the IRS (Pet. Br. 42 n.28), is without merit. The injuries suffered by respondents flow directly from the IRS' failure to take any enforcement action against the Church. If the IRS is required to take enforcement action, the injury will be redressed because the IRS will be treating the Church no differently than any other tax-exempt body. That the Church may object is of no consequence. Moreover, it is entirely speculative whether the Church will object to any action the IRS may be ordered to take. See Orr v. Orr, 440 U.S. 268 (1979).

C. Prudential Considerations Do Not Argue Against Recognizing Standing For Respondents.

Petitioners argue that even if respondents have suffered a cognizable injury, standing should nonetheless be denied in deference to prudential and separation of power concerns. Petitioners, however, distort respondents' claims when they portray resolution of this case as involving massive judicial intervention into complex matters of bureaucratic administration. Respondents invoke only the traditional adjudicatory powers of the federal judiciary, the exercise of which would require minimal intervention into the operations of the executive. Furthermore, separation of power principles argue in favor of judicial resolution of respondents' claims.

1. The Remedy Requested Is Unintrusive.

The minimal level of judicial intrusion required to resolve this dispute

clearly distinguishes this case from Allen v. Wright, 468 U.S. 737 (1984). In Allen, plaintiffs sought to use the federal judiciary to force the IRS to rewrite detailed regulations governing the enforcement of the policy against providing tax support to segregated schools.

The Court found that the plaintiffs "[did] not challenge particular identified unlawful IRS actions," 468 U.S. at 766, but rather sought the "restructuring of the apparatus established by the Executive Branch," id. at 761.⁵¹

By contrast, respondents here assert a much more limited claim. They do not challenge a general regulatory scheme or seek to compel the rewriting of a set of regulations. The relevant cong-

⁵¹/The Allen Court did state, however, that its holding "[did] not rest on the more general proposition that no consequence of the allocation of administrative enforcement resources is judicially cognizable." Id. at 761 n.26.

ressional policy they seek to enforce is crystal clear.⁵² Their enforcement would not involve petitioners' parade of bureaucratic horrors; it is the everyday business of the IRS. Respondents ask only that the IRS apply the existing statute and regulations evenly to all religious groups.^{52a}

2. Prosecutorial Discretion Does Not Bar Respondents' Suit.

Petitioners rely on Heckler v. Chaney, 470 U.S. 821 (1985), to argue that executive enforcement decisions are inappropriate for judicial resolution. (Pet. Br. 42-43) Chaney, however, is not applicable -- even as an analogy -- to the case at hand.

52/ Nor is there any ambiguity about the criteria to be applied. Section 501(c)(3) contains an absolute prohibition against partisan political activity by tax-exempt organizations. In writing this statute, Congress has spoken "[w]ith undeniable clarity." Bob Jones University v. United States, 461 U.S. 574, 613 (1983) (Rehnquist, J., dissenting).

52a/ As the District Court put it:
Although the complaint implicates social policy issues, it does not call for judicial selection of an appropriate policy. Congress already has made that choice and set out the correct policy in § 501(c)(3); plaintiffs ask only for a judicial determination of whether defendants have observed Congress's commands concerning paying taxes and engaging in political activity.
(Pet. App. 79a, 101a-102a).

In Chaney this Court considered the reviewability of agency enforcement decisions by construing the statutory language of the "committed to agency discretion" provision of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2). The considerations relevant to that statutory inquiry do not apply to a case alleging violations of the plaintiffs' fundamental constitutional rights.⁵³ The Court specifically noted that its holding did not apply to or address constitutional injuries, 470 U.S. at 838, or cases involving (as here) conscious or intentional patterns of agency non-enforcement. Id. at 832 n.4; see also id. at 839 (Brennan, J., concurring) (deference not appropriate where "agency engages in a pattern of

⁵³/In Chaney itself, the complaining parties did not allege that the agency's non-enforcement caused an injury to any independent statutory or constitutional interest the parties had.

non-enforcement of clear statutory language").⁵⁴ Particularly in light of the serious nature of respondents' constitutional injuries, "prosecutorial discretion" is an inappropriate basis for denying standing in this case.

3. Separation of Powers Considerations Favor Standing.

In Allen this Court held that separation of powers principles have "a role in defining [standing] requirements." 468 U.S. 761 n.26. The principles should be seen as guideposts to understand, and not simply to limit,

⁵⁴/As respondents challenge on constitutional grounds the failure of the government properly to enforce the statute, they in effect are claiming that the government exceeded the permissible bounds of prosecutorial discretion. Surely, the mere possibility that the government may defend its actions by claiming prosecutorial discretion should not rise to the level of an insurmountable jurisdictional obstacle to suit. Such a holding would effectively insulate the executive branch from judicial scrutiny any time the agency being sued waives a red flag of prosecutorial discretion.

standing. As this Court has consistently held:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943).⁵⁵

The case at hand presents a situation in which the actions of the executive branch taint the political process by which the representative branches are elected. Moreover, respondents challenge the government's grant of tax-exempt

⁵⁵/See Davis v. Passman, 442 U.S. 228, 252 n.1 (1979) (Powell, J., dissenting) ("[T]he federal courts have a far greater responsibility under the Constitution for the protection of those rights derived directly from it, than for the definition and enforcement of rights created solely by Congress.")

status to a religious organization which is then permitted to use the subsidy to help put in office those who would continue the exemption. This presents perhaps the greatest danger the Establishment Clause was designed to prevent: a mutually supportive relationship between government and a particular religion.

Respondents should not be expected to seek relief from those who have benefitted from the challenged actions. Separation of powers principles argue here for the independent branch of government to provide a judicial forum to hear the merits of respondents' claims.⁵⁶

⁵⁶/To rely on prudential notions of separation of powers would be peculiarly inappropriate where, as here, the infringement involves specific administrative activity which distorts and "restricts those political processes which can ordinarily be expected to bring about [relief]" United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); see also J. Ely, Democracy and Distrust: A Theory of Judicial Review 183 (1980) ("constitutional law appropriately [Footnote 56 continued on next page]

Accordingly, the District Court's decisions on standing are eminently correct under any standard of review, and certainly cannot be said to constitute the usurpation of power.

[Footnote 56 continued from previous page] exists for those situations where representative government cannot be trusted, not those where we know it can").

As the Fifth Circuit held in a similar context:

We do not believe that prudential notions of self-restraint in the area of standing are properly invoked in cases involving the dilution of an individual's fundamental voting rights: when a complaint alleges injury stemming from a clogged democratic process, it would be anomalous to require the plaintiff to seek relief from political institutions.

O'Hair v. White, 675 F.2d 680, 689 (5th Cir. 1982) (en banc).

Conclusion

The judgment of the Court of Appeals
should be affirmed.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE
and
NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Petitioners,
v.
ABORTION RIGHTS MOBILIZATION, INC., *et al.,*
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-416

UNITED STATES CATHOLIC CONFERENCE

and

NATIONAL CONFERENCE OF CATHOLIC BISHOPS,

v. *Petitioners,*

ABORTION RIGHTS MOBILIZATION, INC., *et al.,*
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

Respondents do not contest the fundamental principle that a court without Article III power has no power to issue and enforce a judicial subpoena. Yet they argue that a district court need not consider its power to issue and enforce a subpoena before exercising it. Respondents also concede that a contempt judgment against a nonparty is generally appealable. Yet they argue that the court of appeals need not consider what would ordinarily be the threshold issue on such an appeal—whether the district court had Article III power to enter the judgment.

Respondents' effort to avoid the issue of Article III power in this case is understandable, but unavailing. It flies in the face of this Court's pronouncements about the appealability of contempt orders and the obligation of all federal courts to satisfy themselves of their power to act.

Respondents' effort to avoid the controlling force of *Allen v. Wright*, 468 U.S. 737 (1984), *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), and *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976), is also unavailing. Those decisions completely foreclose the respondents' claims of standing, and establish that the district court in this case was without Article III power.

I. THE DISTRICT COURT'S ARTICLE III POWER IS PROPERLY AT ISSUE

A. Article III Power Is Required To Enforce A Judicial Subpoena

Respondents largely ignore the initial question presented by this case—whether the judicial subpoena and contempt powers are limited by Article III. The court of appeals recognized that if subject matter jurisdiction, or Article III power, is necessary to support a judicial subpoena, then a “witness would have standing” to challenge the court’s power or jurisdiction. Pet. A. 12a.

The court of appeals held, however, that a court’s “lack of subject matter jurisdiction does not disable a district court” from issuing and enforcing subpoenas addressed to the merits of a suit. Pet. A. 12a. In their opening brief, USCC/NCCB noted the sharp conflict between that view and this Court’s statement in *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950), that the “judicial subpoena power . . . is subject to” the limitations of Article III. See Brief for Petitioners (“Br. Pet.”) 14. In the absence of a case or controversy under Article III, USCC/NCCB argued, a district court is without judicial power to issue a subpoena or to compel compliance through civil contempt.¹

¹ USCC/NCCB have acknowledged that the necessity of deciding jurisdiction justifies subpoenas designed to secure information relevant to jurisdiction. Br. Pet. 13, 19. But respondents have made no claim that the subpoenas here related to jurisdiction.

Respondents do not even cite *Morton Salt*, much less take issue with USCC/NCCB’s argument. In fact, respondents now appear to concede the point. In their only reference to the question whether Article III power is required to enforce a subpoena, they state:

Petitioners argue that appellate review must be available, . . . because *a court without jurisdiction has no power to enforce a subpoena*. But this argument is a non sequitur. That a court without jurisdiction lacks judicial power *may be a truism*, but it says nothing at all about if, when or by whom a trial court’s decisions are appealable.” Br. Resp. 37 (emphasis added).

Respondents’ apparent position is that even though a court without Article III power lacks power to issue and enforce a judicial subpoena, the recipient of such a subpoena may not raise the issue of judicial power in the district court or on appeal from a contempt judgment. That contention is insubstantial.

B. Witnesses May Challenge The District Court’s Article III Power To Subpoena Them And Hold Them In Contempt

Having conceded, implicitly if not explicitly, that a court without Article III power cannot issue and enforce a subpoena, respondents are hard-pressed to explain why a witness may not challenge a subpoena as beyond the issuing court’s Article III power. A subpoena may be challenged on the ground that it is “unduly burdensome or otherwise unlawful,” *United States v. Ryan*, 402 U.S. 530, 532 (1971) (emphasis added), and a subpoena that is beyond the power of the court is both “unlawful” and “unduly burdensome.” See *In re Sealed Case*, 827 F.2d 776, 778 (D.C. Cir. 1987); see also Fed. R. Civ. P. 12(h)(3); 45(b)(1), (f).

In support of their argument that a witness may not contest the court’s Article III power to issue a subpoena, respondents cite one case—*Blair v. United States*, 250 U.S. 273 (1919). As explained in our initial brief, how-

ever, *Blair* did not even address the judicial subpoena power conferred by Article III. See Br. Pet. 25-26.

Respondents essentially ignore most of the cases establishing the right of a contemnor to attack a contempt judgment on the ground that the order violated was beyond the court's jurisdiction. See Br. Pet. 15-19. They attempt to distinguish *United States v. United Mine Workers*, 330 U.S. 258, 295 (1947), by arguing that the jurisdictional challenge in that case was to the court's power to issue a particular kind of order, not to its power to entertain the suit. But in at least two cases cited by USCC/NCCB, *In re Burrus*, 136 U.S. 586 (1890), and *In re Sawyer*, 124 U.S. 200 (1888), the jurisdictional defect was that the court had no jurisdiction over the underlying suit.² And in *United Mine Workers* itself, the Court stated unequivocally that civil contempt orders will be vacated if the order that was disobeyed was "erroneously issued" or "beyond the jurisdiction of the court." 330 U.S. at 295. Any order entered in a suit that is beyond the court's Article III power is itself "beyond the jurisdiction of the court." Thus, in upholding the contempt judgments in *United Mine Workers*, the Court emphasized that "the subject matter of the suit, as well as the parties, was properly before the court," and "the elements of federal jurisdiction were clearly shown." 330 U.S. at 294; see also *id.* at 293.³

² Respondents dismiss those cases as involving orders that were not interlocutory. Br. Resp. 48n. 23. But the contempt order in this case was not interlocutory. See pp. 5-6, *infra*. The cases, in any event, were not cited on the issue of appealability. They were cited for the proposition that an alleged contemnor may defend against a contempt charge on the ground that the court lacks jurisdiction over the case in which the underlying order is issued.

³ Respondents attempt to blunt the force of *United Mine Workers* by noting that the district court in this case has ordered any fine paid to the Treasury, not to them. But *United Mine Workers* did not hold simply that a litigant may not profit financially from a civil contempt order entered without jurisdiction. A litigant who fails to present a case or controversy under Article III is not entitled to

C. The Court Of Appeals Was Obligated To Consider The District Court's Article III Power

1. This Is Not an Interlocutory Appeal

The principal thrust of the respondents' position is that the appellate courts in this case have no occasion to consider the district court's Article III power because, as they put it, there is "simply nothing here to be appealed." Br. Resp. 38. The appeal is interlocutory, they contend, because it raises an issue—the court's Article III power—that had also been raised on a motion to dismiss. In respondents' view, this appeal is "in substance . . . indistinguishable from a direct appeal of the District Court's denial of the government's motion to dismiss." Br. Resp. 39.

Of course, if these characterizations of the appeal were accurate—if the appeal were truly interlocutory—then it should have been dismissed. But both the court of appeals majority and the respondents agree that the appeal had to be entertained to the extent of determining that "colorable jurisdiction" existed in the district court. See Br. Resp. 55-61. Thus, despite their rhetoric, respondents implicitly recognize that this is not an interlocutory appeal.⁴

The fact is that, for purposes of this appeal, the district court has not denied a motion to dismiss; it has entered a *judgment* of contempt and ordered two non-parties to pay daily fines totalling \$100,000. That judgment was final and, as the respondents necessarily concede, Br. Resp. 54, immediately appealable. See, *e.g.*, *United States v. Ryan*, *supra*; *Cobbledick v. United*

any of the benefits of a civil contempt order—including its coercive effect upon the witness. In fact, *United Mine Workers* makes clear that not even criminal contempt can survive a subsequent determination that jurisdiction was lacking, unless the underlying order was entered to facilitate a decision on jurisdiction

⁴ Respondents conceded in the court of appeals that the appeal was not interlocutory. Brief of Plaintiff-Appellees 16-17.

States, 309 U.S. 323, 328 (1940). When a contempt judgment is entered against a nonparty, there is nothing left for him to litigate in the district court.

This power to punish [for contempt] being exercised the matter becomes personal to the witness and a *judgment as to him*. Prior to that the proceedings are interlocutory in the original suit.

Alexander v. United States, 201 U.S. 117, 122 (1906) (emphasis added). Thus, when a witness is held in contempt, his "situation becomes so severed from the main proceeding as to permit an appeal." *Cobbledick v. United States*, 309 U.S. at 328. Not to allow an immediate appeal would, as a practical matter, "forever preclude review." *Ibid*.

2. Appellate Courts Must Consider Jurisdictional Defects in Appealable Orders

A civil contempt order, like any final order, may be attacked on appeal on the same grounds upon which it may be resisted in the district court—including the ground that the district court lacked Article III power to act. Respondents disagree. They argue that a contempt order, although "generally appealable," Br. Resp. 54, may not be appealed on the ground that the order was beyond the district court's Article III power, because the parties to the underlying lawsuit may (and in this case did) challenge the court's Article III power. But no issue is more fundamental than Article III power, and it would be strange indeed to allow an appeal from a contempt order, but not on the ground that the district court was without judicial power to enter it. A witness held in contempt is entitled to a "full review of his claims," *United States v. Ryan*, 402 U.S. at 533, and that "full review" necessarily embraces any claim that the district court exceeded the constitutional limitations on its judicial power. Indeed, once an appeal is properly taken, the appellate court "has a special obligation 'to satisfy itself not only of its own jurisdiction, but also that of the lower court[].'" *Bender v. Williamsport Area School*

Dist., 475 U.S. 534, 541 (1986) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)).

Respondents insist that "*Bender* does not establish the automatic appealability of any challenge to the jurisdiction of a district court." Br. Resp. 44. Of course it doesn't, and USCC/NCCB have never said that it does. The denial of a party's motion to dismiss for lack of jurisdiction is not immediately appealable. Jurisdictional issues, like other issues, may be presented to the court of appeals only on review of an appealable order. But when, as in this case, there is an appealable order, that order may certainly be attacked on appeal on the ground that the district court lacked judicial power to enter it.

In arguing to the contrary, respondents invoke *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). But that case did not involve an appeal from a final judgment of contempt against a nonparty, and it does not support the proposition that the district court's jurisdiction is immune from scrutiny on such an appeal. *Cohen* held that in limited circumstances a party has a right to appeal certain orders, *otherwise interlocutory*, that "finally determine claims of right separable from, and collateral to, rights asserted in the action." 337 U.S. at 546. It did not hold that a contempt judgment against a nonparty, *otherwise appealable*, becomes nonfinal and nonappealable if the witness's defense happens to coincide with a claim that may be made by a party.⁵ *Cohen*

⁵ There is no case of which we are aware that holds, or even remotely suggests, that there are any limits on the right of a nonparty contemnor to raise on appeal any challenge that affects the validity of the contempt order—either because the challenge resembles an argument that may be made by a party, or for any other reason. Indeed, in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981), this Court indicated that a contempt order is directly appealable without regard to whether the issues raised meet the test of *Cohen*. Of course, contentions going to the merits of the lawsuit—for example, failure to state a claim—will not generally affect the validity of a subpoena or contempt order. But the fact that a nonparty contemnor might seek to raise an irrelevant argument does not render his appeal interlocutory.

certainly did not hold that when an appeal is taken by a nonparty from a contempt judgment, as it unquestionably may be, the appellate court is disabled from considering the threshold question on any appeal—whether the district court had jurisdiction to enter the challenged order. Such a result would be flatly contrary to *Bender* and the numerous other decisions upon which it relies.

3. *There Are No Practical Reasons To Decline To Consider Jurisdiction*

Respondents protest that allowing a nonparty witness to attack the jurisdictional basis of a contempt order on appeal would lead to intolerable delays in litigation. But USCC/NCCB do not seek to establish any new appellate rights in this case. It has been established law at least since 1906 that contempt orders against nonparties may be appealed. See *Nelson v. United States*, 201 U.S. 92 (1906); *Alexander v. United States*, 201 U.S. 117 (1906). And the fact is that an appeal of a contempt order against a nonparty “does not interfere with the orderly progress of the main case.” *International Business Machines Corp. v. United States*, 493 F.2d 112, 115 n.1 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974). The main case may proceed simultaneously with the appeal, and a stay of the civil contempt order need not be granted if such a stay would unduly delay the main case.

This Court, in any event, has expressly rejected the suggestion that a nonparty’s right to appeal a contempt order should be denied because it “may involve an interruption of the trial or of the investigation.” *Cobbledick v. United States*, 309 U.S. at 328. As the Court explained, “not to allow this interruption would forever preclude review of the witness’ claim, for his alternatives are to abandon the claim or [accept the continuing burdens of contempt].” *Ibid.*⁶

⁶ Thus, unless USCC/NCCB may raise their constitutional challenge to the district court’s contempt order on this appeal, they will be forced to choose between abandoning the claim altogether or allowing the \$100,000 daily fine to accumulate indefinitely. Allowing them to raise their challenge to the contempt order in conjunction

Respondents argue, however, that allowing a witness held in contempt to challenge the court’s Article III power on appeal would invite collusion: a party could circumvent the rule against interlocutory appeals, they contend, by subpoenaing a friendly witness willing to place himself in contempt. But the fear of collusion is far removed from this case. These subpoenas were issued at the request of the plaintiffs, not a defendant seeking to establish the court’s lack of jurisdiction. And they were served upon anything but a friendly witness. The district court, in any event, has more than adequate power to deal with parties who engage in collusive and sham maneuvers. It can deny a stay of contempt sanctions pending appeal, and it can impose additional sanctions under Rules 11 and 26(g) of the Federal Rules of Civil Procedure.⁷

with an appeal on the merits in the underlying suit would be a hollow gesture. There may never be any appeal in the underlying action, and if there is it may be years from now. As nonparties, the USCC/NCCB have no control whatsoever over the course of the underlying action. They cannot expedite the case, nor can they take steps to ensure that there is an adjudication between the parties that would permit an appeal.

⁷ This is not a case like *Washington v. Standard Oil Co.*, 747 F.2d 1303, 1305 (9th Cir.), *cert. denied*, 471 U.S. 1100 (1984), in which a nonparty has such a “congruence of interests” with a party that a contempt order against the nonparty “may not be severed from the primary action or treated as final.” In that case, a state’s Attorney General was held in civil contempt based on the state’s noncompliance with an order issued to it as a party. The court found a “congruence of interest between [the Attorney General] and the state” for two reasons: (1) the state would pay the cost of all sanctions, and the Attorney General was therefore not “directly at risk”; and (2) the Attorney General “control[led] the strategy and tactics of the suit” for the state, including the decision whether to resist a discovery order. 747 F.2d at 1306. Here, by contrast, the government has not agreed to pay any fine against USCC/NCCB, and neither the government nor USCC/NCCB is employed by, much less controlled by, the other. The mere fact that they agree upon the court’s lack of Article III power does not establish that their interests in this case are identical. In fact, if the plaintiffs were

In sum, the principles that a nonparty may appeal a contempt order, and that an appellate court presented with such an appeal must consider the power of the district court to act, are firmly established. The issue that cannot be avoided on this appeal, then, is whether the district court had Article III power—more specifically, whether the respondents had standing.

II. THE RESPONDENTS LACK STANDING

Respondents' complaint in this case is that the Secretary of the Treasury and the Commissioner of Internal Revenue "have done nothing to enforce the law" against the Catholic Church. Br. Resp. 9; JA 13-14, ¶ 32; see also JA 10, ¶ 20. But "the interest in the just administration of the laws, including the interest in non-discriminatory criminal enforcement, is presumptively deemed nonjusticiable *even if invoked by persons with something beyond a generalized bystander's concern*; only if the litigant is immediately affected as a target of enforcement can that presumption be overcome." L. Tribe, *American Constitutional Law* § 3-16, at 124 (1988) (emphasis added) (citing *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), and *O'Shea v. Littleton*, 414 U.S. 488 (1974)).

This principle is "[not] a doctrinal quirk unique to the field of criminal law administration." *Ibid.* It applies equally to the enforcement of the tax code. This Court's decisions "'suggest[] that litigation concerning tax liability is a matter between taxpayer and IRS, with the door barely ajar for third party challenges.'" *Allen v. Wright*, 468 U.S. at 748-49 (quoting *Wright v. Regan*, 656 F.2d 820, 828 (D.C. Cir. 1981)). Implicitly recognizing the heavy burden they face in establishing their standing to challenge someone else's tax status, respond-

to prevail in this case, USCC/NCCB and/or related entities and contributors may have to pay substantial sums of money to the government.

ents labor mightily to describe some personal injury to themselves. But that effort fails, in large part for two reasons.

First, they do not allege that the IRS has ever done anything to them: they have not been denied tax exemptions or threatened or challenged in any way by the IRS. As a result, a judgment against the IRS will not relieve any burden, or confer any benefit, upon the respondents.

Second, respondents concede, implicitly if not explicitly, that it is speculative to say that the Catholic Church and its members would alter their alleged political activities in any way if the IRS were ordered to take enforcement action against them. As a result, the respondents are unable to say that their ability to communicate their message, much less elect their candidates, will be enhanced *even indirectly* if the relief they seek is granted. All they can say is that a judgment in their favor would impose an economic burden on the Catholic Church or its members, and that is simply not enough to establish standing.

A. The Clergy Respondents Lack Standing

In *Valley Forge* this Court rejected the notion "that enforcement of the Establishment Clause demands special exceptions from the requirement that a plaintiff allege 'distinct and palpable injury to himself,' . . . that is likely to be redressed if the requested relief is granted." 454 U.S. at 488 (citations omitted). Thus, while a "spiritual stake" may be the basis for a claim of injury, it will not suffice to confer standing, any more than an economic or other interest, if it is "'abstract' or 'conjectural' or 'hypothetical.'" *Allen v. Wright*, 468 U.S. at 751. Spiritual injury will support the standing of those "'who are directly affected by the laws and practices against which their complaints are directed.'" *Valley Forge*, 454 U.S. at 487 n. 22 (quoting *Abington School Dist. v. Schempp*, 374 U.S. 203, 224 n.9 (1963)) (emphasis added).

Respondents, however, “do not complain of [government] action specifically directed against them.” Br. Resp. 69 (emphasis added). Instead, like the plaintiffs in *Valley Forge*, respondents claim that an Establishment Clause violation necessarily injures those who are not members of a religious group that has allegedly received an impermissible benefit. As they put it, “governmental endorsement or discrimination . . . necessarily denigrates the beliefs of those who disagree with the official preferred religion.” Br. Resp. 71. As explained in our initial brief, however, there is no basis for any claim of denigration in this case—indeed, there is no such claim in the amended complaint. See Br. Pet. 31-33. Catholicism has not been announced as the “official preferred religion,” Br. Resp. 71,⁸ nor have the clergy respondents’ religions been denounced as inferior. What the government has done—or, more precisely, not done—is neutral on its face and denigrating to no one.

Moreover, even if the respondents could allege some factual basis for a claim of denigration or stigma, they “do not allege a stigmatic injury suffered as a direct result of having personally been denied equal treatment.” *Allen v. Wright*, 468 U.S. at 755 (emphasis added). See Br. Pet. 33-35. Accepting that standard, respondents argue in their brief that they have “personally . . . been subjected to discrimination as a result of the government’s policy.” Br. Resp. 80. But that argument is belied by their concession that they “do not complain of [government] action specifically directed against them.” Br. Resp. 69. The undisputed facts are that none of the clergy respondents has sought and been denied a tax exemption; none has had a tax exemption revoked; none has been threatened with enforcement action of any

⁸ In *Walz v. Tax Comm’n*, 397 U.S. 664, 675 (1970), this Court noted that “[t]he grant of a tax exemption [to a church] is not sponsorship” and “[t]here is no genuine nexus between tax exemption and establishment of religion.”

kind. In fact, other than the granting of tax exemptions to some of the plaintiffs, none of them has alleged any contact with the IRS at all.⁹

The clergy plaintiffs thus stand in a very different posture from the plaintiffs in *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), and *Heckler v. Mathews*, 465 U.S. 728 (1984). In each of those cases, the plaintiff claimed that he was denied a benefit that was conferred upon others. Here, by contrast, the respondents have been denied no benefit. In fact, their allegation that the Catholic Church is receiving preferential treatment rests entirely upon their *assumption*—unsupported by any alleged facts—that the government *would* treat them differently from the Catholic Church *if* they behaved as they say the Catholic Church has.¹⁰ Such an assumption is not a well-pleaded fact, and need not—indeed, must not—be assumed to be true. The allegation is entirely “conjectural” and “hypothetical.” *Allen v. Wright*, 468 U.S. at 751.¹¹

⁹ In their brief, respondents refer to just one case in which the IRS allegedly suspended or withdrew a tax exemption because of a violation of § 501(c)(3)’s limitation on political activities. Br. Resp. 17-18. That case arose 24 years ago and did not involve any of the respondents.

¹⁰ Respondents state in their brief that “[t]he IRS has allowed Catholic clergy to electioneer . . . in ways that are forbidden to the clergy respondents,” and that it has “refus[ed] to permit the clergy respondents . . . to employ the same techniques” as Catholic clergy. Br. Resp. 75, 79. But there is no allegation in the complaint or in the affidavits that the clergy respondents have ever attempted to engage in any activity Catholic clergy are alleged to have engaged in, much less that the IRS has ever taken or threatened action against them, or even instructed them not to engage in such activities. The clergy respondents have not even inquired about their right to engage in such activities—or, for that matter, complained to the IRS that Catholic clergy have been permitted to engage in activities they consider to be impermissible. The amended complaint simply alleges, “[u]pon information and belief,” that “other citizens and taxpayers” have informed the IRS of the Church’s allegedly illegal activities. JA 13, ¶ 31 (emphasis added).

¹¹ The fact that “direct governmental coercion is not a necessary element of a violation of the Establishment Clause,” Br. Resp. 71,

The claim of the clergy respondents here is in essence the same as the claim rejected in *Valley Forge*—that they have witnessed the conferral of a benefit upon a church to which they do not belong, and with which they disagree. Because they are clergy, they may feel more intensely about the matter than others, and may object with greater fervor. But “standing is not measured by the intensity of the litigant’s interests or the fervor of his advocacy.” *Valley Forge*, 454 U.S. at 486. The clergy respondents are, therefore, without standing.

B. The Respondents Lack Voter-Or Citizen Standing

In their amended complaint, respondents alleged that the IRS’s lack of enforcement action “impairs and diminishes plaintiffs’ right to vote.” JA 17, ¶ 48(b). And in their brief, respondents cite decisions of this Court

does not mean that distinct and palpable personal injury is not required to establish standing. As the Court recognized in *Valley Forge*, there may be some violations of law, in the Establishment Clause area as well as in others, that no one has standing to challenge. 454 U.S. at 488-90. In cases in which the Court has recognized standing to complain of an alleged Establishment Clause violation, the plaintiff has suffered “‘distinct and palpable injury to himself.’” *Id.* at 488 (citations omitted). See, e.g., *Corporation of the Presiding Bishop v. Amos*, 107 S. Ct. 2862 (1987) (employee allegedly victimized by religious discrimination); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (employer required by statute to grant employees Sabbath leave); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (children subjected to religious exercise); *Marsh v. Chambers*, 463 U.S. 783 (1983) (legislator subjected to legislative Chaplain’s prayers); *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116 (1982) (restaurant denied liquor license); *Larson v. Valente*, 456 U.S. 228 (1982) (church required to register and report fundraising efforts); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (public school teacher forbidden to teach evolution); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (schoolchildren subjected to Bible reading); *Engel v. Vitale*, 370 U.S. 421 (1962) (schoolchildren subjected to prayer); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (candidate for office required to affirm faith in God); *McGowan v. Maryland*, 366 U.S. 420 (1961) (retail clerks convicted of doing business on Sunday).

establishing that voters have standing to challenge government action that abridges their right to *vote* or dilutes the strength of their *votes*.¹² But the respondents’ brief, as well as the affidavits and the factual allegations of the complaint, makes clear that they have no claim that their right to *vote* has been impaired. Instead, they claim distortion of the pre-electoral political process. But that claim is itself belied by the respondents’ steadfast refusal to allege, or even argue, that enforcement action by the IRS would affect the level or nature of the religiously motivated political activity allegedly engaged in by the Catholic Church and its members. “It is irrelevant,” they repeat, “whether the Church will continue to be active politically or if its members will increase their donations” as a result of any enforcement action. Br. Resp. 90.

But if respondents do not claim that the Catholic Church and its members will alter their alleged political conduct as a result of a judgment—much less that election results will be affected—then what redressable injury do they claim? Respondents argue that “the government permits the Catholic Church . . . to use the power and prestige arising from the Church’s standing in the community to partisan advantage.” Br. Resp. 88. If, however, enforcement action by the IRS will not alter the Church’s alleged political conduct, then whatever “partisan advantage” the Church has enjoyed is neither fairly traceable to the government’s conduct nor likely to be redressed by a judgment.

Respondents also argue that “[t]he government’s actions make it much more expensive for respondents to donate money to political campaigns . . . as compared to campaign contributors with Catholic Church backing.”

¹² *McMichael v. County of Napa*, 709 F.2d 1268 (9th Cir. 1983), also involved dilution of the plaintiff’s vote.

and that “[c]andidates backed by the Church . . . can raise funds more easily than . . . the candidates they [respondents] support.” Br. Resp. 87, 88. This argument, however, is without a factual basis in the complaint, for the complaint does not allege that the Catholic Church has given money to candidates.¹³ In any event, respondents cannot base their standing on any alleged difficulty candidates may have in raising money, because none of the respondents is a candidate for office.¹⁴ Nor can respondents claim concrete injury as campaign contributors. Their political contributions will cost them the same whether or not the IRS takes enforcement action against the Catholic Church. And if the allegation is simply that the government has conferred an improper financial benefit on the Catholic Church and its contributors, then the claim is indistinguishable from the claim of standing rejected in *Valley Forge*.

The respondents’ real claim in this case is that they have standing merely because the government has allegedly violated the law by failing to revoke the tax exemption enjoyed by their perceived ideological adversary, regardless of whether revocation of the exemption would alter their adversary’s conduct or improve their own position in any way. They claim that their indifference to what may occur as a result of enforcement action by the IRS distinguishes their position from that of the plaintiffs in *Allen v. Wright*. In *Allen*, respondents

¹³ The brief contains the assertion that “Catholic priests . . . are allowed by the IRS to funnel Church funds to, or to solicit tax-deductible donations for candidates they support.” Br. Resp. 78. But the complaint contains no such allegation. The complaint alleges instead, “upon information and belief,” that dioceses have contributed money to “right-to-life” groups that have, “directly or indirectly, supported” anti-abortion candidates. JA 13, ¶ 27.

¹⁴ One of the respondents, Karen DeCrow, ran for Mayor of Syracuse in 1969, but she is not now a candidate for anything and has no concrete plans to run for anything in the future. See JA 63.

argue, the “plaintiffs’ injury was the diminished ability to obtain for their children racially integrated schooling,” Br. Resp. 91—an injury that could not be shown to have been caused by the government. But the Court in *Allen* addressed another claim, which is indistinguishable from the claim now asserted by the respondents in this case—namely, “a claim simply to have the Government avoid the violation of law alleged in respondents’ complaint.” *Allen*, 468 U.S. at 753-54. As the Court noted, “an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.” *Id.* at 754.

The claim does not gain substance by calling the government’s allegedly illegal conduct a “distortion of the political process.” Br. Resp. 87. Since the respondents do not argue that the Catholic Church’s alleged political activity would be altered in any way as a result of the enforcement action they seek, it is difficult to see what “distortion” is alleged to have occurred. But apart from that defect, the argument fails because it entirely eliminates the requirement that a plaintiff show “distinct and palpable injury to himself.” *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

Respondents’ argument would permit citizen standing to challenge a broad range of governmental activity based on the mere allegation that the alleged illegality had distorted some process in which the citizenry has an interest. In *Allen* itself, the plaintiffs could have alleged that by conferring an unlawful tax exemption on segregated schools, the government had distorted the important process of integration. In *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), the plaintiffs could have stated explicitly, as they did implicitly, that allowing Military Reservists to sit in Congress had distorted the legislative process. See Br. Pet. 37-38. In *United States v. Richardson*, 418 U.S. 166 (1974), the plaintiffs could have alleged that the government’s re-

fusal to make public the CIA's budget distorted the democratic process by which citizens control the operation of government. In *Ex parte Levitt*, 302 U.S. 633 (1937), the plaintiff could have asserted that allowing Hugo Black to sit on the Supreme Court distorted the Court's decisionmaking process. In *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980), the plaintiffs challenging the Carter administration's use of federal funds to promote the President's renomination could have established standing by using precisely the same formulation of alleged injury as the one employed here—a "distortion of the political process."¹⁵ In virtually every case involving the Federal Election Commission, a citizen could also complain that governmental action has distorted the electoral process.

¹⁵ *Common Cause v. Bolger*, 512 F. Supp. 26 (D.D.C. 1980), is indistinguishable from *Winpisinger*. In both cases, the plaintiffs complained of an incumbent's ability to use federal resources to subsidize his campaign. As discussed in our initial brief, at 40-41, the court of appeals in *Winpisinger* held that the "dilution" of the challenger's efforts caused by the incumbent's use of government resources was not sufficient to confer standing. In *Bolger*, the district court concluded that it was. USCC/NCCB submit that *Winpisinger* was correct and *Bolger* was incorrect. See also *Shakman v. Dunne*, 829 F.2d 1387, 1397-98 (7th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3569 (1988). Both cases, however, presented stronger claims of standing than this case. First, the plaintiffs in those cases included candidates who complained that their chances of being elected were adversely affected by the challenged practices. Second, those plaintiffs could complain of unequal treatment—the incumbents had access to direct government financial support to which they could not possibly have had access. Here, by contrast, the respondents can only *assume* that they *would* be treated differently *if* they were to do what they say the Church has done. Third, in those cases a judgment in the plaintiffs' favor would have eliminated a source of funding for the plaintiffs' opponents. Here, by contrast, it is entirely speculative whether a judgment in the respondents' favor would reduce the "religiously compelled" contributions of Catholics, JA 16, 56-58, or, more importantly, the religiously motivated activity allegedly engaged in by the Church.

Such claims do not confer standing, any more than the claims of the citizen plaintiffs in this case.

In the final analysis, the respondents in this case claim nothing more than a "shared individuated right" to a government that does not establish religion and that enforces the tax laws according to their priorities. *Valley Forge*, 454 U.S. at 482. That claim is insufficient to support standing. It is "too abstract to constitute a 'case or controversy'" under Article III. *Schlesinger v. Reservists Committee*, 418 U.S. at 227; see *Allen*, 468 U.S. at 754-55; *Valley Forge*, 454 U.S. at 482-85. It is, at most, "a 'generalized grievance' shared in substantially equal measure by . . . a large class of citizens." *Warth v. Seldin*, 422 U.S. at 499. And since the claim is that law enforcement action should be initiated, it is "more appropriately addressed" in the executive branch, *Allen*, 468 U.S. at 751, which has the constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const., Art. II, § 3."

CONCLUSION

The judgment of civil contempt should be reversed.

Respectfully submitted,

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No. 87-416

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MONTANA, OHIO, PENNSYLVANIA, TENNESSEE, TEXAS,
VIRGINIA AND WEST VIRGINIA,
AMICI CURIAE, IN SUPPORT OF THE
PETITIONERS**

INTEREST OF AMICI CURIAE*

Under the circuit court's unprecedented ruling in this case, virtually any corporate entity, voter, citizen, taxpayer, or person who subjectively feels compar-

* Counsel of record to the parties in this case have consented to the filing of this brief, and letters of consent have been filed with the Clerk pursuant to Rule 36.

atively disadvantaged by a federal agency's interpretation of a tax exemption is licensed to undertake fishing expeditions for the ideological catch of the day. The circuit court's decision, in effect, expands drastically the subpoena power of plaintiffs who should not be permitted to utilize the coercive discovery mechanisms of the federal rules of civil procedure. Witness/contemnors, rather than being afforded full review on appeal of a contempt order, have instead been disqualified from contesting such an order on grounds that the district court has "colorable," though perhaps not "actual," article III jurisdiction. The Rutherford Institute is opposed to the restriction of rights of appeal due involuntary witnesses who have been adjudged in contempt of court, fined, and threatened with further invasions of their private files by would-be plaintiffs.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and rector at St. Andrews University. With state chapters in Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Kentucky, Michigan, Minnesota, Montana, Ohio, Pennsylvania, Tennessee, Texas, Virginia and West Virginia and its national office in Manassas, Virginia, the Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to first amendment freedoms. Counsel for *Amici Curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF THE CASE

Abortion Rights Mobilization, Inc., other "pro-choice" organizations, and individuals who are voters (hereinafter collectively, "plaintiffs"), have challenged the federal tax-exempt status of the Roman Catholic Church. These plaintiffs contend that they are comparatively disadvantaged, as voters and abortion rights activists, so long as the Roman Catholic Church retains its tax-exempt status¹ and continues to engage in the political and moral debate over abortion. Although two church entities were originally named as defendants in this action, namely the United States Catholic Conference and the National Conference of Catholic Bishops (hereinafter "petitioners"), they have been dismissed as defendants on the ground that plaintiffs have asserted no valid claim against them. See *In re United States Catholic Conference*, 824 F.2d 156, 159 (2d Cir. 1987), *pet. for reh. den.* ____ F.2d ____ (2d Cir. 1987). Two government defendants remain parties.²

This matter reached the United States Court of Appeals for the Second Circuit after the petitioners were served with (deposition) *subpoenas duces tecum* demanding over 20,000 pages of documents. Petitioners refused to comply, and the district court granted plaintiffs' motion to hold them in contempt.³ On appeal,

¹Tax-exempt status is now provided to the Church by the Internal Revenue Code, 26 U.S.C. §501(c)(3)(1982).

²The executive agencies of the United States government named as defendants are the Secretary of the Treasury and the Commissioner of Internal Revenue.

³*Abortion Rights Mobilization, Inc. v. Baker*, 110 F.R.D. 337, 338 (S.D.N.Y. 1986). Judge Carter imposed a daily fine of \$50,000, and he also ruled that the plaintiffs were entitled to attorney's fees. See *In re United States Catholic Conference*, 824 F.2d at 160. The contempt order, although final, was stayed pending an appeal to the

petitioners contended that the district court lacked jurisdiction to issue subpoenas and contempt orders because (1) the plaintiffs lacked standing to sue, (2) the district court has no subject matter jurisdiction to issue advisory opinions, and therefore (3) the district court lacked article III power to hold petitioners in contempt. The circuit court held that petitioners lacked standing to raise these issues.⁴

SUMMARY OF ARGUMENT

The concept of taxpayer standing would be radically expanded if every taxpayer could challenge the tax exemptions, credits, and deductions that Congress provides to other persons and organizations.⁵ The circuit court's unprecedented ruling departs dramatically from the mainstream law of standing. Its curious decision

United States Court of Appeals for the Second Circuit.

⁴The dissenting judge observed exactly where the majority opinion went off track when he wrote, "Since a federal court's power to issue discovery and civil contempt orders derives from and necessarily depends on its jurisdictional power to hear the underlying action before it, . . . these witnesses are entitled . . . to challenge the district court's subject matter jurisdiction. . . ." *In re United States Catholic Conference*, 824 F.2d at 167.

⁵In *Abortion Rights Mobilization, Inc. v. Baker* 110 F.R.D.337, 338 (S.D.N.Y. 1986), and *Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. 970 (S.D.N.Y. 1985) the district court held that *Allen v. Wright*, 468 U.S. 737 (1984) (denying standing to plaintiffs who sued Commissioner of Internal Revenue) does not bar plaintiffs' standing to sue the Commissioner in the instant case. The district court distinguished *Allen v. Wright* from the instant case, and placed great weight, *Regan*, 603 F. Supp. at 971, on *Coit v. Green*, 404 U.S. 997 (1971), summarily aff'g *Green v. Connolly*, 330 F. Supp. 1150 (D.C. 1971), even though the *Coit* plaintiffs were no longer adverse parties with any government defendants when the case reached the Supreme Court, and even though this Court has explained that *Coit* "has little weight as a precedent on the law of standing." *Allen*, 468 U.S. at 764.

reverts back to the rigid "legal rights" test in order to deny petitioners standing in the circuit court. On the other hand, its decision tears down all standing barriers that disqualify plaintiffs with generalized grievances. The circuit court's decision, which goes from one extreme to the other, completely ignores pertinent cases, like *Allen v. Wright*, 468 U.S. 737 (1984) and *Simon v. Eastern Ky. Welfare Rts. Org.* 426 U.S. 26 (1976) (neither case was cited in its majority opinion),⁶ and it erroneously relies on a dated case barely relevant: namely, *Blair v. United States*, 250 U.S. 273 (1919). The circuit court compounds its error by completely misapprehending the holding and reasoning of *Blair*.

Of course, the circuit court *did not* hold that the district court actually has subject matter jurisdiction in this case. How could it? To do so would threaten the very underpinnings of the separation of powers doctrine. Nevertheless, its ruling invites every resentful Tom, Dick, and Mary with generalized grievances to embark on indefinite and extensive fishing expeditions under cover of the discovery rules. The lower court's open-ended invitation reads as follows: "if . . . colorable jurisdiction exists, a [witness/ contemnor] may not challenge plaintiffs' standing in the underlying action or raise other issues that might demonstrate that the District Court has erroneously exercised subject matter jurisdiction over that action." *In re United States Catholic Conference*, 824 F.2d at 165.⁷

⁶Instead of discussing plaintiffs' standing, which was the gravamen of petitioner's appeal, the circuit court perversely held that the petitioners themselves lacked "standing to assert such a claim on appeal from an adjudication of contempt." *In re United States Catholic Conference*, 824 F.2d at 162.

⁷Judge Kearse concurred speculating that, to some extent, the discovery sought might disclose "information pertinent to the issue

In short, according to the circuit court, most ideologically motivated plaintiffs, who may fall well short of article III standing requirements, are free to enlist to their advantage, and with impunity, the coercive processes of a trial court, even though it may lack actual subject matter jurisdiction. The bizarre other side of this coin is that most witnesses held improperly in contempt, are denied meaningful appellate review and relief. This kind of judicial double-standard not only allocates judicial resources improperly, and distorts the efficient administration of the judicial process, it is also alien to fundamental fairness. It disqualifies persons from appealing orders issued by district court judges who are left free to exercise uncontrolled and unreviewable discretion to punish witnesses who *justifiably* challenge the court's dubious assertion of article III jurisdiction. This is truly an intolerable distortion of justice.

of plaintiffs' standing " *In re United States Catholic Conference*, 824 F. 2d at 166-167. Plaintiffs, however, never alleged nor established how the documents in possession of petitioners were relevant to their standing to sue the government defendants, and Judge Kearse did not identify which of plaintiffs' factual allegations (which are presumed to be true) needed to be corroborated by the subpoenaed documents. *Id.*

I.

The Circuit Court Should Have Exercised Its Plenary Appellate Powers To Decide Whether The Petitioners May Be Held In Contempt For Duly Resisting Subpoenas Issued In A Matter That Was Not, Under Applicable Precedents, A Case Or Controversy Within The District Court's Article III Jurisdiction.

A. *BLAIR V. UNITED STATES* DOES NOT SUPPORT THE PROPOSITION THAT A WITNESS LACKS CAPACITY TO CHALLENGE THE DISTRICT COURT'S JUDICIAL POWER IN AN APPEAL THAT SQUARELY PRESENTS PURE QUESTIONS OF LAW CONCERNING THE COURT'S ARTICLE III JURISDICTION.

The district court's orders holding the petitioners in contempt were immediately appealable and, without delay, the circuit court should have exercised its appellate powers to provide witnesses,⁸ who are unconstitu-

⁸As the circuit court majority opinion states, "In this respect a witness has appellate rights superior to those of a party." *In re United States Catholic Conference* 824 F.2d at 160 (Newman, J., majority opinion). See also *In re Manufacturers Trading Corp.*, 194 F.2d 948 (6th Cir. 1952); *Fenton v. Walling*, 139 F.2d 608 (9th Cir.1944), *cert. denied*, 321 U.S. 798 (1944); see generally 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, §3917 at 616, 622-23, 626-27 (1976), 9 Moore's *Federal Practice* ¶110.13[4] at 167 (1986 & Supp. 1986-87). "[A]llowing these witnesses to obtain immediate appellate review does not subvert the final judgment rule since any claims they have must be asserted . . . on appeal from their contempt sanction—or be forever lost." *In re United States Catholic Conference*, 824 F.2d at 170 (Cardamone, J., dissenting). Hence, the district court's order holding petitioners in contempt was appealable, as the circuit court recognized when it stated, "A witness adjudicated in civil contempt for failure to comply with discovery orders unquestionably has a right to appeal from the contempt order, notwithstanding the lack of a final judgment in the underlying lawsuit in which discovery was sought." *In re United States Catholic Conference*, 824 F.2d at 160. Non-party witnesses, like petitioners, have a right to appeal a contempt order

tionally held in contempt, with full and meaningful judicial review and appropriate relief. Although the circuit court recognized the appellate rights of witnesses held in contempt, its decision severely limits the scope of a contemnor's appeal whenever district court jurisdiction is "colorable." In such "colorable" situations, contemnors in petitioners' shoes, who challenge the lower court's "actual" subject matter jurisdiction, supposedly lack standing to obtain immediate and complete judicial review and relief, even when urgent relief from civil contempt orders issued by lower courts without article III jurisdiction is needed and deserved.⁹ This new bifurcated standard is not justified on the basis of sound

without waiting for final judgment to be entered in the civil action that gave rise to the allegedly contumacious conduct. See e.g., *United States v. Ryan*, 402 U.S. 530, 532 (1971), *Cobbledick v. United States*, 309 U.S. 323, 326-27 (1940) (citing *Alexander v. United States*, 201 U.S. 117, 121-22 (1906)). If a witness is held in contempt, his "situation becomes so severed from the main proceeding as to permit an appeal." *Cobbledick v. United States*, 309 U.S. at 328.

⁹The Supreme Court has held that when a federal court acts in excess of its jurisdiction, an order punishing a person for contempt is void. *Ex parte Rowland*, 104 U.S. (14 Otto) 604, 612, 26 L. Ed. 861 (1881). See also *In re Burrus*, 136 U.S. 586, 597 (1890), *In re Sawyer*, 124 U.S. 200, 221-22 (1888), *Ex parte Fisk*, 113 U.S. 713, 726 (1885). Judge Posner writes, "You cannot (with exceptions not pertinent here) get discovery in the federal courts unless you have a pending lawsuit, and . . . if the order is invalid the contempt judgment must be set aside." *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1158 (7th Cir. 1984) (en banc), *rev'd on other grounds*, 470 U.S. 373 (1985). "Thus, under *Marrese*, . . . [i]f it is determined that the lawsuit should not have been pending because the district court lacked subject matter jurisdiction, then the discovery order falls . . . [a]nd . . . the contempt judgment for its disobedience must *a fortiori* be vacated. *In re United States Catholic Conference*, 824 F.2d at 169 (Cardamone, J., dissenting).

policy considerations; nor does the novel distinction between "actual"—as opposed to "colorable" jurisdiction—effectively conserve important and limited judicial resources.

A needless and unwise technicality has been injected into the law by the circuit court's order that, in effect, causes irreparable harm to the government defendants and to petitioners held in contempt. Moreover, when the circuit court accepts an appeal, as it must, to determine whether there is "colorable" jurisdiction, it makes no sense to withhold normally exercised appellate power to determine squarely presented challenges to the district court's "actual" subject matter jurisdiction. No research is wasted in deciding the latter question but not the former. Had the circuit court properly reached the question of "actual" subject matter jurisdiction, it could have saved precious time, not to mention the energy and judicial resources, that will now be wasted by the parties in discovery in the lower courts. The situation is further muddled embarrassingly by the circuit court's odd citation of *Blair v. United States*, 250 U.S. 273 (1919), in support of its holding.

The circuit court completely misunderstood the rationale underlying *Blair*, and therefore this dated and inapposite precedent was applied in a counterproductive and anomalous way. *Blair* involved appeals from orders adjudging witnesses "guilty of contempt of court because [they refused] to obey an order directing them to answer certain questions asked of them before a federal grand jury" *Id.* at 276. The principal question urged upon the Supreme Court was whether "the Act of June 25, 1910, c. 392, 36 Stat. 822, and its amendments . . . are unconstitutional" *id.* at 278, but the Court held that it was unnecessary to decide whether or not the statute was constitutional—because the grand jury had

identified neither the "precise nature of the offense, if there be one" nor "the identity of the offender." *Id.* at 282. Therefore, the Court held that "witnesses are not entitled to take [premature] exception to the jurisdiction of the grand jury or the court over the particular-subject matter that is under investigation." *Id.* (emphasis added).¹⁰

The holding in *Blair* makes sense because, as the Supreme Court held, the grand jury has "authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction." *Id.* at 283. Moreover, since the broad investigatory power and subject matter jurisdiction of the grand jury did not depend upon the constitutionality of a particular statute challenged by Blair, a premature resolution of a particular question of constitutional law could not give Blair the relief he sought. In this case, however, the pertinent facts underlying the cause of action and the question of subject matter jurisdiction are known. Moreover, as Judge Cardamone observed precisely in dissent:

. . . *Blair* represents an ordinary application of the standing doctrine, inapplicable in this case. Here, unlike *Blair*, the jurisdiction of the court to issue a contempt order is derivative of its

¹⁰ It would have been a departure from sound practice if *Blair* held that a federal statute was unconstitutional—before any identifiable person was charged with violating it. Under such contingent circumstances, a witness would not be deemed sufficiently "interested to challenge the jurisdiction of court or grand jury over the subject-matter that [was] under inquiry." *Blair v. United States*, 250 U.S. at 279. In the instant case, by contrast, the government defendants have already been charged by plaintiffs with various and sundry derelictions of law enforcement and abuses of prosecutorial discretion.

jurisdiction over the underlying action. Thus, unlike a grand jury witness these court-ordered witnesses do have an interest in the district court's proper exercise of its authority.¹¹

Notwithstanding the obvious difference in the posture of this case from *Blair*, the circuit court nevertheless found *Blair* to be "[t]he most pertinent authority," *id.*, at 160, primarily relying *id.*, at 162, on *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982). *Blair*, of course, was properly cited in *Valley Forge* because, as in *Ashwander v. TVA*, 297 U.S. 288 (1936), the Constitution's Property Clause (Art. IV, § 3) was allegedly violated by federal executive agencies implementing statutes enacted by Congress. *Ashwander v. TVA*, 297 U.S. at 330-40. Given the Property Clause issues presented by these cases, Chief Justice Rehnquist appropriately cited the very first case Justice Cardozo cited in his famous *Ashwander* concurrence: *Blair*. See *Ashwander*, 297 U.S. at 341.

To avoid unnecessary confrontations with "the other two coequal branches of the Federal Government," Justice Rehnquist wrote, ". . . this Court has " 'refrain[ed] from passing upon the constitutionality of an act [of the representative branches] unless obliged to do so . . . ' " *Valley Forge Christian College*, 454 U.S. at 474 (citing *Blair*). The irony for the present case is obvious; the article III jurisdictional question ducked by the circuit court enables the district court to pass upon, gratuitously, several delicate issues of constitutional

¹¹ *In re United States Catholic Conference*, 824 F.2d at 173 (Cardamone, J., dissenting).

law.¹² It was just such a gratuitous resolution that the *Blair* Court avoided. Thus, the circuit court completely misunderstood the reason for and Property Clause context of the *Blair* citation in *Valley Forge*.

In sum, the facts in the *Blair* appeal did not present the jurisdictional question whether there was a case or controversy; *per contra*, petitioners' appeal to the circuit court did. It follows that petitioners *qua* contemnors had standing to obtain relief that would have provided them with meaningful redress from unauthorized district court proceedings had the circuit court decided, without wasteful delay, the squarely presented article III question.

B. THE CIRCUIT COURT'S CURIOUS EXPANSION OF THE DOCTRINE OF "COLORABLE" JURISDICTION IS DRACONIAN IN PRACTICE, AND THEREFORE THE ALTERNATE FORMULATION FOUND IN *ABBOTT LABORATORIES V. GARDNER* IS A FAR MORE APPROPRIATE STANDARD FOR BALANCING THE COMPETING FACTORS IN THE REVIEW OF CONTEMPT ORDERS DULY APPEALED BEFORE FINAL JUDGMENT.

The circuit court held that a witness, who is not asserting an evidentiary privilege, may *not* challenge a district court's subject matter jurisdiction in his appeal of a contempt order—if the lower court has "colorable" jurisdiction. This is bad law. The circuit court's doctrine of colorable jurisdiction is perhaps appropriate and applicable when, as in *United States v. United Mine*

¹²If the circuit court in this case had decided, or at least discussed, the question of subject matter jurisdiction, it might avoid the need to determine ultimately whether a federal statute: namely, 26 U.S.C. §501(c)(3), as applied, "violates the First Amendment of the United States Constitution." *Abortion Rights Mobilization, Inc. v. Baker* 110 F.R.D. at 338.

Workers, 330 U.S. 258 (1947) (but unlike this case),¹³ an appellant affirmatively defies a court order long before he files an appeal. In such cases, the contemnor "who defies the public authority and willfully refuses his obedience, does so at his peril." *Id.* at 303; *see also Maness v. Meyers*, 419 U.S. 449, 458-59 (1975).

The petitioners, in this case, sought *pre-compliance* review of the contempt order rather than acting at their peril. Pre-compliance review, in many cases, serves the ends of justice. For example, in *Maness v. Meyers*, *id.*, a lawyer who was not a party to the underlying suit (involving his client), was permitted to appeal a contempt order issued immediately after he advised his client not to provide evidence that was arguably within the client's fifth amendment privilege. The Supreme Court recognized that the lawyer should have the opportunity of obtaining pre-compliance review because "appellate courts cannot always 'unring the bell' once the information is released." *Maness*, 419 U.S. at 460. The *Maness* Court recognized that later attempts to secure relief from unconstitutional judicial inquiries provide "no assurance whatever" that "the cat," once out of the

¹³"[A]n order issued by a court with jurisdiction over the subject matter and person must be obeyed . . . until it is reversed by orderly and proper proceedings." *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947) (emphasis added). The *United Mine Workers* Court held, that the duty of obedience obtains where, as here, "the subject matter of the suit . . . was properly before the court; where the elements of federal jurisdiction were clearly shown" *Id.* at 294 (emphasis added). However, when on appeal, it turns out that a district court order "was beyond the jurisdiction of the court", the contemnor is entitled to remedial relief. *Id.* at 295.

Although the petitioners in this case duly filed an appeal, the circuit court refused to ascertain, contrary to *United Mine Workers*, whether the contempt order was "issued by courts possessed of jurisdiction of persons and subject matter." *Id.* at 303.

bag, can be put back. *Id.* at 463. It provided the lawyer not only with pre-compliance review, but with a *remedy* that fully protected him from the consequences of an improperly issued contempt order. The circuit court, however, in this case, expects petitioners simply to "abide by any orders of the district court once the stay is terminated." *In re United States Catholic Conference*, 824 F.2d at 163.

This expectation springs an unfair and vicious trap. Unless petitioners are held in contempt, they cannot appeal, but their appeals were a sham since, without affording full and immediate review, the circuit court ominously advised petitioners to let the cat out of the bag, or suffer further consequences. Once out, the cat is forever loose in the hands of ideological adversaries.

Appellate review becomes toothless when courts of appeal, in effect, inform witness/contemnors (and more significantly, their adversaries), that there is no prospect of any truly remedial appellate action. Surely the law cannot, and should not leave involuntary witnesses so unprotected and vulnerable to abuse of process.

The tried and true formula articulated in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), is eminently suitable for balancing the competing factors in this case. Instead of denying standing to all witnesses held in contempt whenever a plaintiff, who stands to profit by the enforcement of the discovery order, manages to file artfully drawn pleadings that pass the evanescent test of "colorable" jurisdiction, this Court should apply the *Abbott Laboratories* test of reviewability. Then, the ripeness of a contemnors' appeal would turn on "the fitness of the issues" for judicial review and "the hardship to the parties of withholding [pre-compliance] court consideration" of the district court's subject matter

jurisdiction. *Cf. Abbott Laboratories v. Gardner*, 387 U.S. at 149.

In the instant case, the pleadings and the record filed in the circuit court clearly are sufficient for a determination of the case or controversy question presented by petitioners' appeals. Moreover, the postponement of immediate and full consideration of their appeals presents a severe hardship to them, as well as to the government defendants. On the other hand, as in *Abbott Laboratories*, immediate and meaningful consideration of petitioners' appeals presents no hardship to the circuit court, and even the plaintiffs are benefitted if they learn, before trial, that they do not qualify as Article III parties.

No doubt, under these circumstances, this Court's formulation of a workable standard in *Abbott Laboratories* is far more suitable than the meaningless ritual that perfunctorily makes sacrificial lambs of witnesses who are, in effect, required to subject themselves to contempt citations in order to perfect remedially barren appeals. In sum, the circuit court's half-baked and unworkable notion of "colorable jurisdiction" amounts to a charade that is bad law.

II.

The Hardship To Petitioners Of Substantial Fines And Attorneys Fees, And Immediate Jeopardy Of A Criminal Contempt Order Is More Than Sufficient To Justify Their Standing To Appeal The Civil Contempt Orders In This Case

The money damages, which have been assessed by the district court, are palpable, concrete, and substantial economic losses. The fines (\$50,000 per day) could not have been imposed on petitioners, *but for* the discovery enforcement and civil contempt orders that were issued erroneously by the district court that lacked, at least in petitioners' view of the case, actual subject matter jurisdiction. The petitioners and plaintiffs are clearly in

adversarial positions. The petitioners' personal stake in the controversies over the original discovery order, the contempt order, the fines, and the district court order requiring petitioners to pay plaintiffs' attorneys fees assures "'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

The petitioners would have had meaningful review of their challenge to the contempt order if the appellate court had proceeded to full consideration of the district court's article III jurisdiction. The circuit court's surprising (and it is not too much to add *outrageous*) refusal to reach this question on grounds of petitioners' standing was based on the novel, unprecedented, and indeed, dangerous notion that the district court had "colorable" subject matter jurisdiction, and that petitioners needed some personal interest—over and above their personal interest in keeping confidential 20,000 documents (privacy rights), their personal interest in avoiding the stigma of a contempt order, their fifth amendment rights of due process of law, their religious interests (protected by the free exercise and establishment clauses of the first amendment), their personal interest in avoiding the obligation to pay a fine (of \$50,000 per day), their personal interest in avoiding the payment of attorneys fees of plaintiffs who resent their tax exempt status, and their personal interest in dismissing a suit that threatens to place them in criminal contempt, and which, if successful, will terminate their constitutionally guaranteed tax-exempt status, merely because they seek to exercise first amendment rights including freedom of speech.

In short, petitioners have been subjected to several severe, costly and coercive orders, and are in imminent

danger of being held in criminal contempt. It is impossible to imagine a more direct, relevant, and constitutionally significant personal interest.

The foregoing factual predicate meets the core constitutional component of the Supreme Court's standing doctrine, as set forth in *Allen v. Wright*:

The injury alleged must be, for example, 'distinct and palpable,' *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth v. Seldin* . . . [422 U.S.] at 501, and not "abstract" or "conjectural" or "hypothetical," *Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). The injury must be "fairly" traceable to the challenged action, and relief from the injury must be "likely" to follow from a favorable decision. See *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S., at 38, 41.

468 U.S. 737, 751 (1984). See also *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 471-474 (1982).

The circuit court concedes that "witnesses have standing to question . . . whether the District Court has a colorable basis for exercising subject matter jurisdiction, but if colorable jurisdiction exists—[petitioners may only challenge] "discovery orders that implicate [their] personal rights" *In re United States Catholic Conference*, 824 F.2d at 158. This holding flies in the face of the Supreme Court's repeated admonition that, when article III questions are presented, the "'fundamental aspect of standing' is that it focuses primarily on the party seeking to get his complaint before the federal court rather than on the issues he wishes to have adjudicated.'" *United States v. Richardson*, 418 U.S.

166, 174 (1974) (emphasis in original) (quoting *Flast v. Cohen*, 392 U.S. at 99).

The circuit court's approach revitalizes the long discarded legal rights requirement. In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), the Supreme Court specifically rejected the "legal interest" or "legal right" approach as tests that go to the merits of the controversy, rather than bearing on the standing issue. *Id.* at 153. To the extent that the circuit court is basing its holding *sub silentio* on prudential considerations, they do not apply; first, because petitioners are not asserting the rights of third parties, not before the court, and second because no "other governmental institutions may be more competent [than the federal courts] to address the questions" presented by petitioners' appeal from the district court's contempt order. Compare *Warth v. Seldin* 422 U.S. 490, 500 (1975). Since the *jus tertii* and prudential separation of powers concerns are inapplicable, petitioners' appeal presents a straightforward article III challenge that could be decided as a question of law, without further discovery.

If petitioners comply with the order to pay plaintiffs the coercive fines assessed, as the circuit court believes they will, *In re United States Catholic Conference*, 824 F.2d at 163, and if they decline the imminent threat of being held in criminal contempt and turn over the documents (before the government defendants' have another opportunity to raise the question of subject matter jurisdiction), the irreparable harm they suffer cannot be undone, even if the government defendants eventually prevail. If petitioners do not pay their fines and refuse to turn over the documents, and are held in criminal contempt, the ensuing loss of good will, so precious and indispensable to the bona fides of any religious body,

constitutes irreparable harm, and the Supreme Court has in the past held that forcing such a Hobson's Choice on litigants is unjust. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967) (excellent discussion of the doctrine of ripeness indicating that the question turns on the "fitness of the issues for judicial decision" and the hardship on the parties of withholding court consideration"). In the instant case, the issue of subject matter jurisdiction is fit to decide, and the unprecedented hardship on the petitioners should not be tolerated by this Court.

The circuit court's niggardly exercise of its appellate powers in this case is inexcusable, given this Court's recent and unequivocal mandate in *Bender v. WilliamSPORT Area School Dist.*:

Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. See *e.g.*, *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 173-180, 2 L. Ed. 60 (1803). For that reason, every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. *Mitchell v. Maurer*, 293 U.S. 237, 244 . . . (1934). See *Juidice v. Vail*, 430 U.S. 327, 331-332 . . . (1977) (standing). "And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of

the lower court in entertaining the suit.” *United States v. Corrick*, 298 U.S. 435, 440 . . . (1936) (footnotes omitted).

U.S. , 106 S. Ct. 1326, 1331 (1986). The *Bender* principle (i.e., *sua sponte* duty of appellate courts to decide Article III questions of law) obtains no less when the power of a federal court to issue a *subpoena duces tecum* depends on its subject matter jurisdiction under the Judiciary Article of the Constitution. The principle was succinctly and ably stated by Justice Jackson in *United States v. Morton Salt Co.*:

Federal judicial power . . . extends only to adjudication of cases and controversies and it is natural that its investigative powers should be jealously confined to these ends. The judicial subpoena power not only is subject to specific constitutional limitations . . . but also is subject to those limitation inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution.

338 U.S. 632, 641-42 (1950). Whatever prudential considerations motivated the circuit court when it denied petitioners’ standing (and they were not clearly identified), they cannot override a federal appellate court’s duty to vacate duly appealed orders that are wrongfully issued by district courts lacking power under Article III of the Constitution of the United States.

III.

The Court Of Appeals Erred In Failing To Determine That Plaintiffs’ Civil Action Was Not An Article III Case or Controversy, Even Under Its Colorable Jurisdiction Standard, Because Plaintiffs’ Pleadings Demonstrate Clearly An Utter Lack Of Standing To Sue The Government Defendants.

Although the circuit court held that the district court’s “colorable” jurisdiction is based on plaintiffs’ claim of a “direct, personal injury arising from the fact that the federal defendants’ fail[ed] to enforce the political action limitations of section 501(c)(3),” the only injury it identified is the plaintiffs’ “competitive disadvantage with the Catholic Church in the area of public advocacy on important public issues.” *In re United States Catholic Conference* 824 F.2d at 165-66. No specific economic disadvantage or present objective harm was determined to exist by the circuit court (or the district court).

Whenever an organization is suing on its own behalf, the key question is whether it has alleged “a concrete and demonstrable injury to [its] activities . . .” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Although “[a] wide variety of injuries have been recognized in this context,” L. Tribe, *American Constitutional Law* 145 (2d ed. 1988), in line with the Supreme Court’s unbending policy against assertion of generalized grievances, an organizational litigant is always required to allege “more than simply a setback to [its] abstract social interests . . .” *Havens Realty Corp. v. Coleman*, 455 U.S. at 379 (citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)). A competitive disadvantage does not necessarily impair perceptibly the plaintiffs’ abilities to engage in pro-choice or pro-abortion activities, such as counselling, referrals, lobbying, and demonstrating. Indeed, no perceptible specific problem has

been identified contrary to the requirements of *Laird v. Tatum*, 408 U.S. 1 (1972), and countless other Article III cases.

The circuit court cited, as support for plaintiffs' "colorable" standing, two so-called "zone of interests" cases involving substantial economic injuries suffered by competitors of business entities who were wrongfully permitted to engage in economic activity contrary to federal statutes. In both of these cases, *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) and *Clarke v. Securities Industry Ass'n.*, 107 S. Ct. 750 (1987), plaintiffs claimed standing under the Administrative Procedure Act, 5 U.S.C. 702, which authorizes judicial review at the instance of any person who has been "adversely affected or aggrieved by agency action within the meaning of a relevant statute." However, "[n]either the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III." *Valley Forge Christian College*, 454 U.S. at 487-88, n.24; see e.g., *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth v. Seldin*, 422 U.S. at 501); see also *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). Moreover, it was clear that the competition permitted by federal agencies in *Data Processing* and *Clarke* caused dollars-and-cents injuries. New competitors were allegedly authorized to enter the market, contrary to Congress' prohibition. Thus, the only issue was whether this economic injury was "arguably within the zone of interests to be protected or regulated by the statute . . ." *Clarke*, 107 S. Ct. at 756. The zone of interest test, in the instant case, does not come into play because the plaintiffs have not plausibly averred, with due specificity, that they have been injured in some concrete way by the competitive

disadvantage. Moreover, plaintiffs have not shown how any objectively ascertainable competitive disadvantage which affects them personally can be eliminated by the declaratory or injunctive relief sought in the district court.

Plaintiffs do allege that the Internal Revenue Service has failed to carry out their legal obligations concerning church entities, but "[s]uch suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication." *Allen v. Wright*, 468 U.S. at 759-760 (1984). The proper procedure requires the circuit court to compare "the allegations of the particular complaint to those made in prior standing cases" involving the Internal Revenue Service. *Allen v. Wright*, *supra*, 468 U.S. at 751-752. See also *Los Angeles v. Lyons*, 461 U.S. 95, 102-105 (1983). In every case, the harm allegedly sustained by a private plaintiff who sued the Internal Revenue Service (but who was not seeking tax relief), the Supreme Court has held that plaintiffs' injuries, economic or otherwise, are too indirect, attenuated, and abstract in view of the speculative prospect of obtaining relief from the injury (as a result of a favorable ruling). E.g., *Allen v. Wright*, *supra*; *Simon v. Eastern Kentucky Welfare Rights Org.*, *supra*. "The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement." *Allen v. Wright*, 468 U.S. at 766 (quoting *Simon*, 426 U.S. at 39).

These cases "suggest 'that litigation concerning tax liability is a matter between the taxpayer and IRS, with the door barely ajar for third party challenges.'" *Allen v. Wright*, 468 U.S. at 748-749. The door is *never* ajar when the private plaintiffs "claim no injury dependent on taxpayers's actions" *Id.* at 749, or when it is entirely

speculative whether the injunctive relief sought by plaintiffs will decrease the constitutionally protected efforts of the Roman Catholic Church in the marketplace of ideas. It is also entirely speculative to what extent the tax exemption enjoyed by plaintiffs directly thwarts any concrete religious or political action program that is not only conceivable, but which plaintiffs actually planned.

If the competitive disadvantages allegedly caused by IRS inaction, or by its refusals to revoke tax exemptions satisfy article III case or controversy requirements, it is hard to imagine a situation where a person or corporate entity, without an equalizing exemption, will lack standing to sue federal agencies that permit exemptions. A rule of standing based on competitive disadvantage, as suggested by the lower courts, invites *every* person or entity in the nation to challenge statutory exemptions that, abstractly considered, cause some generalized comparative disadvantages. "Abstract injury is not enough. The plaintiff must show that 'he has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' " not 'conjectural' or 'hypothetical.' " *Los Angeles v. Lyons*, 461 U.S. at 101-102. Plaintiffs have not identified any specific project or ministry that they cannot undertake effectively because of their alleged competitive disadvantage. *Cf. Warth v. Seldin*, 422 U.S. at 516. "Indeed, there is no indication that [plaintiffs] have been delayed or thwarted [concerning any] project currently proposed" *Id.*

If an agency's *expenditure of federal funds* cannot be challenged by would-be plaintiffs because the article III requirements reiterated in *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464 (1982) do not confer "colorable"

standing, *a fortiori*, an agency's interpretation of an exemption that does not increase plaintiffs' taxes, but merely provides tax relief to organizations deemed worthy by Congress and federal agencies, cannot be challenged by similarly situated, would-be plaintiffs. Tax exemptions authorized for religious groups avoid excessive entanglement between government and religious groups who use property for religious, educational or charitable purposes. *Walz v. Tax Commissioner*, 397 U.S. 664 (1970). Such tax exemptions foster not only the traditionally protected activities of church entities, but also the free exercise of all religious beliefs including the propagation of beliefs about sin (for example, the Catholic religion's absolute strictures against abortion and its educational efforts to convert others to the Church's position).

To hold that non-exempt organizations have article III standing because of some unspecified theory about competitive disadvantages in the voting booth, or in the marketplace of ideas is, in effect, to junk "[t]he idea of separation of powers that underlies standing doctrine" *Allen v. Wright*, 468 U.S. at 759. Such a fundamental abandonment of core constitutional standing barriers is incompatible with *Valley Forge Christian College*, 454 U.S. at 481-83, and *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

The allegation that the tax exemption of the Roman Catholic Church somehow "diminished plaintiffs right to vote" *In re United States Catholic Conference*, 824 F2d at 159 is rather ingenious, if not disingenuous. "Of course, pleadings must be something more than an ingenious academic exercise in the conceivable." *Warth v. Seldin*, 422 U.S., at 509 (quoting *United States v. SCRAP*, 412 U.S. 669, 688 (1973)). Nothing in this case affects anyone's right to vote or run for office.

Whatever line drawing is required by 26 U.S.C. §501(c)(3), the discretionary decisions and policies of the government defendants are unreviewable at the behest of plaintiffs who cannot identify how their effectiveness as voters has been thwarted directly by tax exemptions administered by federal executive agencies.

The plaintiffs lack even "colorable" standing (assuming but not advocating that this preposterous concept is suitable). The law, of course, is quite clear, that there is no doctrine of *arguable standing*. Professor Tribe correctly restates the hornbook law:

The upshot of *Linda R.S. v. Richard D.* 410 U.S. 614 (1973)] and *O'Shea v. Littleton*, 414 U.S. 488 (1974)] is that the interest in the just administration of the laws, including the interest in nondiscriminatory . . . enforcement, is presumptively deemed nonjusticiable even if invoked by persons with something beyond a generalized bystander's concern; only if the litigant is immediately affected as a target of enforcement can that presumption be overcome.

L. Tribe, *American Constitutional Law* 124 (2d ed. 1988). Cf. *Leeke v. Timmerman*, 454 U.S. 83 (1981). To fail to reverse the Court of Appeals for the Second Circuit, or to even imply that its ersatz "colorable" jurisdiction notion might be a judicially manageable standard, would make the law of standing, already somewhat jumbled, completely unstable.

"Carried to its logical end, ['respondents'] approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is

not the role of the judiciary, absent actual present, or immediately threatened injury resulting from unlawful government action."

Laird v. Tatum, 408 U.S., at 15.

Allen v. Wright, 468 U.S. at 760. In sum, plaintiffs' "personal and professional interests" are not sufficiently specific and concrete to confer standing, be it colorable or otherwise. *Diamond v. Charles*, 106 S.Ct. 1697 (1986). Although [plaintiffs'] allegations may be cloaked in the nomenclature of a special professional interest, it is simply the expression of a desire that the . . . Law as written be obeyed. Article III requires more than a desire to vindicate value interests." *Diamond v. Charles* 106 S. Ct. at 1705-06.

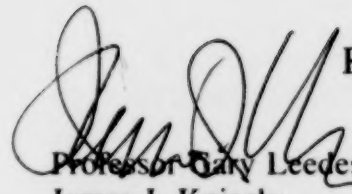
CONCLUSION

The district court's contempt judgment was immediately appealable, and petitioners do not, and should not, lack standing to appeal. Article III, of course, requires a case or controversy. Petitioners here find themselves cited for contempt as a consequence of their reliance on this fundamental requirement, and yet find themselves unable to obtain the complete and immediate appellate review of unauthorized judicial power.

Petitioners are entitled to a ruling that provides them with full remedial relief, since the plaintiffs have literally, with the indispensable assistance of the district court, forced them into contempt. The shame is that the plaintiffs have utterly failed to allege tangible or specific injuries. They appear to be motivated solely (in their suit against government defendants) by purely ideological reasons. Law enforcement for the sake of law enforcement is an interest that *all* voters, persons, and organizations share, but it is not actionable.

This Court often *prudently* requires plaintiffs to show *more* than the minimum essentials of article III standing; the circuit court *imprudently* permitted the plaintiffs, in this case, to show *less*. Therefore, this Court should direct the Court of Appeals for the Second Circuit to vacate the district court's civil contempt order and its award of attorneys fees, and dismiss the action—for lack of a case or controversy within the Judicial Power, as set forth in article III of the Constitution.

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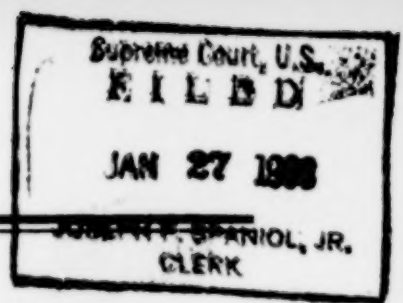
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No. 87-416



IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE
and
NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Petitioners,
v.
ABORTION RIGHTS MOBILIZATION, INC., *et al.,*
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF
CHRISTIAN LEGAL SOCIETY
IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a nonparty witness is entitled to raise absence of Article III Judicial Power as a defense to compulsory orders issued and enforced against it by a federal court.

2. Whether the district court in this case lacked Article III authority to issue and enforce compulsory process against petitioners in the underlying litigation.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-416

UNITED STATES CATHOLIC CONFERENCE

and

NATIONAL CONFERENCE OF CATHOLIC BISHOPS,

v. *Petitioners,*

ABORTION RIGHTS MOBILIZATION, INC., *et al.,*
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF
CHRISTIAN LEGAL SOCIETY
IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

The Christian Legal Society is a nonprofit professional association of 3,500 judges, attorneys, law professors and law students, founded in 1961. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect the free exercise of religion, supporting the appropriate accommoda-

tion by the state of religious beliefs and practices and the respect for religious rights as required by the First Amendment, thus strengthening the individual citizen's respect for, and allegiance to, our constitutional government.

The Christian Legal Society's interest in this particular case is two-fold: First, the district court's contempt order seeks through coercive fines to force a major religious body to divulge internal memoranda and documents in litigation to which it is no longer a party. Coerced production of such documents poses a serious potential threat to religious liberty by compromising the autonomy of churches and the privacy of communications among a church's ministers and leaders. Protection of these religious liberty interests requires that nonparty religious groups aggrieved by such exercises of federal judicial authority against them be permitted to challenge the lawfulness of such orders by federal district courts and obtain full appellate review of the merits of such challenges.

Second, the justification advanced by the district court for exercising the Judicial Power of the United States against petitioners is, in our view, predicated on a distortion of the fundamental character of the establishment clause as a co-guarantor (with the free exercise clause) of *religious liberty*. The Center for Law and Religious Freedom has filed briefs on behalf of amici curiae in this Court on previous questions of interpretation of the establishment clause. See, e.g., *Corporation of Presiding Bishop v. Amos*, Nos. 86-179 and 86-401 (June 24, 1987); *Karcher v. May*, No. 85-1551 (December 1, 1987).

The letters from the parties consenting to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.2.

STATEMENT OF THE CASE

Amicus Curiae adopts the statement of the case in the Brief for the Petitioners.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents two important questions of federal court jurisdiction under Article III of the Constitution. The first issue is the so-called question of petitioners' "standing" to challenge the Article III jurisdiction of the district court, as a defense to that court's attempted exercise of the coercive power of the federal judiciary against them in the issuance and enforcement of compulsory process. The second issue is whether petitioners are correct in their assertion that the district court was without jurisdiction under Article III, and therefore without power to issue and enforce those orders.

The answer to each question is, we submit, quite plain under this Court's settled precedents. First, petitioners' "standing" to challenge the district court's contempt order on Article III jurisdictional grounds is clear under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *Marbury* is, of course, famous for many legal principles. But the fundamental holding of *Marbury* is that federal courts, being courts of a limited jurisdiction prescribed and proscribed by the Constitution itself, may not exercise a jurisdiction conferred or assumed in violation of Article III of the Constitution, so as to compel individuals to take certain actions. In *Marbury*, this Court held that it was without Article III jurisdiction to issue a writ of mandamus directing Secretary of State James Madison to deliver a judicial commission to William Marbury. Madison's "standing" to raise the Constitution defensively, as a shield to the coercive exercise of judicial authority, was not remotely challenged, and indeed was a necessary premise of the Court's decision. Here, petitioners likewise assert that the rendering court lacked

Article III jurisdiction to issue coercive process against them. The Court of Appeals' holding that petitioners lack standing to raise such a challenge is without foundation, and directly contrary to *Marbury*.

Second, petitioners' assertion that the district court lacked jurisdiction is plainly correct under *Allen v. Wright*, 468 U.S. 737 (1984) and *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). The underlying litigation was brought by an abortion-rights advocacy organization and certain individuals seeking to compel the United States government to enforce its laws—in particular, restrictions on political activity by tax-exempt organizations—against a third party. That federal courts lack Article III jurisdiction to entertain such suits is clear under a long line of decisions and, most recently, under *Allen v. Wright*, *supra*, involving a factual posture nearly identical to the one presented here.

This brief will emphasize two points that are not likely to be addressed by the parties in the same manner as presented here. First, while we do not disagree with petitioners' argument for "standing" to challenge jurisdiction,¹ we believe that *Marbury v. Madison*, *supra*, offers an equally clear and altogether straightforward ground for the same basic conclusion. Second, petitioners' attack on the district court's jurisdiction cannot be distinguished from *Allen v. Wright*, *supra*, on the grounds that the underlying lawsuit here asserts an establishment clause rather than an equal protection type

¹ Petitioners argue that the contempt order is fully appealable, and that a federal appellate court has the affirmative obligation to satisfy itself of its own Article III jurisdiction and that of court below (*Bender v. Williamsport Area School District*, 106 S.Ct. 3626 (1986)); therefore, petitioners necessarily have standing on appeal to challenge absence of jurisdiction in the district court. See Petition for Certiorari at 12-13.

of injury. The district court erred in finding a generalized "establishment clause standing" for some plaintiffs-respondents. See generally *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). Nor is there any genuine nexus between plaintiffs-respondents' status as taxpayers, asserting any injury *qua* taxpayers (as distinct from an injury related to participation in the political process), and any right thought to be conferred by the establishment clause. Plaintiffs-respondents allege no judicially-cognizable burden on their freedom from government-compelled participation in, or exercise of, religion; they therefore lack standing under the establishment clause to invoke the jurisdiction of the federal courts.

It is perhaps superfluous to note that these questions, while procedural in form, have enormous substantive consequences for fundamental liberties: The compulsory production of a Church's internal memoranda and documents raises substantial constitutional questions of First Amendment privacy, freedom of association, and the free exercise of religion. See *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 697 (1976). Moreover, in denying "standing" to challenge the district court's Article III jurisdiction, the Court of Appeals deprived petitioners of the basic legal right of all citizens to interpose the Constitution *defensively*, as a shield against exercises of coercive governmental power directed against them that are not sanctioned by the Constitution. Finally, the stakes here are quite high: the district court has imposed a \$100,000.00 a day contempt fine against a church for refusing to produce church documents in a lawsuit which petitioners fervently (and, in our view, correctly) maintain was lawless from its inception. Such a dramatic abuse of power by the district court, with potentially crippling effects on religious liberty, must be reversed by this Court.

ARGUMENT

I. PETITIONERS ARE ENTITLED TO RAISE ABSENCE OF ARTICLE III JUDICIAL POWER AS A DEFENSE TO COMPULSORY PROCESS ISSUED AND ENFORCED AGAINST THEM BY A FEDERAL COURT

A. With all due respect to the court below, we do not understand why the panel had such difficulty with the question of petitioners' "standing" to raise the question of absence of Article III jurisdiction in a proceeding to which they have been subjected to the compulsory authority of an Article III court, and are genuinely aggrieved by the order of that court. The issue, we think, is decisively resolved by *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803): An individual is entitled to assert the unconstitutionality of an *ultra vires* exercise of the Article III Judicial Power of the United States in a proceeding where that Power is sought to be employed against him, to his legal detriment. Indeed, a federal court is obliged to notice and resolve such an issue on its own motion.

The facts of *Marbury* are familiar: William Marbury, appointed to a judgeship during the last days of the administration of President John Adams, applied to the Supreme Court for a writ of mandamus directing Secretary of State James Madison² to deliver to Marbury his commission as a justice of the peace for Washington County, in the District of Columbia. James Madison was made a party to the case by action of the Court in issuing a rule directing him to show cause why a man-

² Mr. Charles Lee, the attorney general in the Adams administration and private counsel for Marbury, emphasized in his argument his view that mandamus was *not* directed against President Jefferson or his administration, which had recently succeeded Adams's, but was addressed to the purely ministerial duties of the Secretary of State alone. 5 U.S. (1 Cranch) at 138-141; *id.* at 149. The Court adopted this position. *Id.* at 158. See also *id.* at 166; *id.* at 169-70.

damus should not issue. No cause was shown, and the Court proceeded to rule on the question of whether a mandamus should issue. The Court, speaking through Chief Justice John Marshall, found that Marbury had a legal right to the commission, that mandamus was the appropriate remedy and that the Judiciary Act of 1789 assigned authority to the Supreme Court to issue writs of mandamus both to courts and to "persons holding office[] under the authority of the United States", which category would include the Secretary of State. 5 U.S. (1 Cranch) at 173.

In the famous section of Marshall's opinion explicating the theory of judicial review, the Court held that mandamus to an officer other than a lower court judge was in its essence an exercise of original, rather than appellate jurisdiction, and that Article III of the Constitution forbade Congress to assign such jurisdiction to the Supreme Court outside of the designated classes of cases set forth in Article III. Relying on the nature of a written constitution as a species of law of a higher order than statutory law, the Court held that it could not give effect to Congress's grant of jurisdiction. Having no jurisdiction to issue the writ requested—that is, having no jurisdiction conformable with Article III to order Madison to do some particular act—the Court denied mandamus and discharged the rule directed to Madison.

Marbury is the cornerstone not only of American constitutional adjudication generally, but of this Court's Article III jurisprudence in particular. Two fundamental and related principles of *Marbury* are directly applicable to the instant case.

First, absence of Article III jurisdiction is an absolute bar to exercise of federal judicial power on persons brought before the court. This principle has direct application to the merits of petitioners' claim that the district court lacked jurisdiction to issue and enforce com-

pulsory process against them, as we will discuss in Part II of our brief. *Infra*, at 12-23.

Second, and applicable to the “standing” question, *Marbury necessarily held*, albeit implicitly, that a person subjected to such compulsory federal judicial process has “standing” to challenge its application to him on the grounds that the exercise of such authority exceeds that provided for by Article III of the Constitution. If the issue was not explicitly addressed by the Court, it was only because the proposition was so self-evidently a corollary of the Court’s resolution of the case on grounds of absence of Article III Judicial Power to compel Madison to deliver the commission. The holding and logic of *Marbury* necessarily requires the conclusion that Madison had “standing” to raise the argument that the Court lacked Article III jurisdiction to issue the requested order against him. Indeed, under *Marbury*, Madison’s “standing” is essentially a non-issue. The Court’s holding in *Marbury* is the source of the rule announced in more recent cases, that Article III limitations, being jurisdictional in nature, may be raised *sua sponte* by the Court. As this Court stated in *Bender v. Williamsport Area School District*, 106 S.Ct. 1326 (1986):

Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. See, e.g., *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 173-180, 2 L.Ed. 60 (1803). For that reason, every federal appellate court has a special obligation to “satisfy itself not only if its own jurisdiction, but also that of the lower courts in a cause under review,” even though the parties are prepared to concede it. *Mitchell v. Maures*, 293 U.S. 237, 244 (1934). See *Justice v. Vail*, 430 U.S. 327, 331-332 (1977) (standing).

Id. at 1331.³

³ Petitioners rely on *Bender*, arguing that, so long as they are entitled to appeal the order in question (see generally *Karcher v. May*, No. 85-1551 (Dec. 1, 1987) at 4), as they plainly are with

Article III is not an *affirmative defense* against otherwise lawful exercise of the Judicial Power by federal courts; it is a *constitutional prerequisite* to the lawful exercise of such authority. It would therefore appear to be of no consequence that petitioners are not parties in the underlying litigation, but witnesses.⁴ What is of consequence is that petitioners stand in the same relation to the federal court and its purported exercise of the Article III Judicial Power as did James Madison in *Marbury*. What was of primary relevance in *Marbury* was not that James Madison was a party to the lawsuit, but that he stood in a direct and adversary relation to the exercise of mandamus authority by the Court. The real dispute in which the question of the Court’s Article III jurisdiction was relevant was *between Madison and the Court*. The *de facto* “plaintiff” and therefore the “party” obliged affirmatively to show jurisdiction was the federal court asserting power over the individual at bar—in *Marbury*, the Supreme Court. So here, petitioners are, like Madison, *de facto* defendants in a controversy with a federal court, and are entitled to assert that court’s lack of constitutional jurisdiction as a defense to the proceeding.

Even under more familiar contemporary “standing” analysis, petitioners are entitled to challenge the district court’s Article III jurisdiction. *Marbury* makes evident that Article III limitations on federal court jurisdiction are not “personal rights” belonging to any particular person, but fundamental restrictions on federal judicial

respect to the contempt order in question, the reviewing court is obliged to pass on the question of the issuing court’s Article III jurisdiction to issue the order. Petitioners’ conclusion follows logically from *Bender* and, indeed, in our view, from *Marbury* itself.

⁴ Petitioners were originally sued as defendants, but were dismissed as parties on the grounds that plaintiffs-respondents had failed to state a claim on which relief could be granted against petitioners. *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471, 487 (S.D.N.Y. 1982).

power, invokable by any person wrongfully subjected to such power. It makes absolutely no sense to argue that petitioners are somehow asserting the "rights" of the Internal Revenue Service under Article III.⁵ Petitioners plainly are asserting their own interests in freedom from intrusive, coercive discovery. Petitioners are injured in that interest as a direct and immediate consequence of the allegedly unlawful conduct of the district court, and that injury would be redressed by a reversal of the district court's assertion of jurisdiction. See *Diamond v. Charles*, 106 S.Ct. 1697, 1707-1708 (1986).⁶

⁵ Even were Article III thought to create a legal "right" that in this case "belonged" to the Government, petitioners have standing to assert this right in defense to the imposition of a legal duty on them, that depends for its validity on the lawfulness of a deprivation of this constitutional "right" of another. See *Craig v. Boren*, 429 U.S. 190 (1976); L. Tribe, *AMERICAN CONSTITUTIONAL LAW* (1978), § 3-26, at 104 ("Just as a litigant should always have standing to claim that he is being penalized for asserting his own constitutional rights, a litigant's claim that complying with a duty imposed upon him would prevent another from exercising a constitutional right presents a clearly justiciable issue about the permissibility of the choice government seeks to impose upon the litigant.") (footnotes omitted).

⁶ We note for the Court's consideration that petitioners' "stake" here, while in some respects the same as any other witness potentially subjected to annoying, intrusive discovery, extends considerably further: What is at stake for petitioners are matters of religious privacy, institutional autonomy and freedom of association—all of First Amendment dimension. See *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979); *Serbian Eastern Orthodox Diocese v. Milivojevic*, 426 U.S. 697 (1976); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Whatever the validity of the Court of Appeals' concern about "collusion" between a dilatory defendant and a witness, those concerns are plainly inapposite here. Petitioners have a unique stake in challenging the district court's jurisdiction, were served with subpoenas by their *adversaries* in the litigation, and presumably would have followed the same course of action had they remained parties in the litigation. Surely, petitioners' right to challenge lawless exercise of federal judicial power against them is not *reduced* by the fact that the court could not grant relief

B. The Court of Appeals in this case strayed quite far from first principles of Article III by following instead an unduly broad interpretation of a single case. The Court of Appeals' reliance on (and extension of) *Blair v. United States*, 250 U.S. 273 (1919), is perplexing, and quite surely wrong. The panel majority's extension of *Blair* makes sense only on the supposition that *Blair* overruled, or severely limited, *Marbury v. Madison*. Nothing in *Blair* remotely suggests such a radical rule.

First, we think it highly doubtful that *Blair* is applicable outside the unique context of grand jury proceedings. While broad language in the *Blair* opinion can be read as suggesting a rule applicable to court and grand jury alike, such language is clearly dictum unnecessary to the holding, and must be considered in light of subsequent holdings of this Court noting different legal standards for the investigative function of a grand jury, and the adjudicative powers of a federal court. As this Court has more recently noted, a grand jury "does not depend on a case or controversy for power to get evidence, but can investigate merely on a suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Powell*, 379 U.S. 48, 57 (1964). Obviously, this is a different rule than governs the power of federal courts.

Second, *Blair* is easily distinguished on the grounds that the witnesses did not challenge the Article III jurisdiction of the district court convening the grand jury, but the absence of subject matter jurisdiction as a result of the alleged unconstitutionality of the federal election laws governing primaries. The distinction is important, for had the witnesses in *Blair* challenged the

against them as parties. And surely, if the right of witnesses to challenge a federal court's Article III jurisdiction is subject to abuse or manipulation, such abuses may legitimately be punished in cases where they arise and are proved. This is not such a case.

Article III jurisdiction of the court they surely should have lost: The court had jurisdiction to decide jurisdiction (see *United States v. United Mine Workers*, 330 U.S. 258 (1947)) and thus had constitutional authority under Article III to pass on the constitutionality of the federal election laws in a challenge by a party injured by those laws. Indeed, the Court in *Blair* suggested precisely such a possible limitation on the scope of its holding: "At least, the court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction." 250 U.S. at 282-83.

This Court's holding in *Blair* that a witness "is not interested to challenge the jurisdiction of court or grand jury over the subject matter that is under inquiry" (250 U.S. at 279) need be read as nothing more than a statement that the grand jury witnesses in *Blair* neither asserted nor possessed any cognizable interest in the constitutionality of the election laws by virtue of their status as witnesses in a grand jury proceeding lawfully impaneled by a federal court possessing unquestioned Article III jurisdiction. Certainly *Blair* does not vitiate *Marbury's* holding that Article III jurisdiction is a fundamental prerequisite to exercise of the Judicial Power of the United States against an individual aggrieved by such action.

II. THE DISTRICT COURT LACKED ARTICLE III JURISDICTION TO ISSUE AND ENFORCE PROCESS IN THE UNDERLYING LITIGATION

Up to this point, we have been addressing the ability of persons to invoke the Constitution (specifically, absence of Article III jurisdiction) *defensively*, where they have been made subject to compulsory judicial orders of an Article III court. We turn now to the converse of this proposition. When a litigant seeks to invoke the power of

federal courts, as it were, *offensively*, in order to obtain affirmative judicial relief for alleged deprivations of legal rights under the laws or Constitution of the United States, he must possess Article III "standing" to sue, in order for the court to have jurisdiction. Where the power of federal courts is invoked as a sword, Article III "requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." *Diamond v. Charles*, 106 S.Ct. 1697, 1707-1708 (1986) (collecting cases) (original quotation marks and citations omitted).

The plaintiffs-respondents in this case plainly lack standing—and the district court therefore plainly lacked jurisdiction over their claims—under the holdings of *Allen v. Wright*, 468 U.S. 737 (1984) and *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), applying in situations closely analogous to the case at bar this Court's reading of Article III's minimum requirements.⁷ The resolution of this question is quite

⁷ This is not a case where the district court was lawfully exercising "jurisdiction to decide jurisdiction". A federal court necessarily has jurisdiction to decide questions of its own jurisdiction under Article III, and a federal court does not act without jurisdiction in enforcing process or court orders necessary to permit determination of this threshold issue (and no other). See *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947); cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The discovery demanded of petitioners here, however, did not go to the issue of respondents' standing to sue the government or the court's jurisdiction, but to the merits of respondents' complaint. With respect, the concurring opinion's attempt to save the rationale of Judge Newman's majority opinion by recasting the case as one involving discovery going to questions of jurisdiction (In re *United States Catholic Conference*, 824 F.2d 156, 166 (2d Cir. 1987) (Kearse, J., concurring)) strikes us as somewhat disingenuous, on the facts of this case. The district court had already finally adjudicated the standing issue on the government's motion to dismiss (*Abortion*

clear, and likely to be thoroughly briefed by petitioners and by the Solicitor General. Accordingly, we do not address all aspects of it here. Rather, we wish briefly to address the district court's rather extraordinary holding—best explained as a strained attempt to distinguish *Allen and Simon*—that some of the respondents possess a special “establishment clause standing” to invoke as plaintiffs the power of federal courts. This argument must be rejected, for two reasons: First, there exists no “establishment clause exception” to Article III’s limitations on the federal Judicial Power; and second, plaintiffs-respondents allege no legally cognizable injury to any of the particular *personal* interests protected by the establishment clause.

A. There Is No Generalized Establishment Clause Exception To Article III Standing Requirements

The notion of a generalized establishment clause exception to usual Article III standing requirements was rejected by this Court in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). In *Valley Forge*, the Court specifically repudiated a theory of special establishment clause standing that had been articulated by the court of appeals in that case, and that closely resembles the theory propounded by the district court here. This Court noted in *Valley Forge* that “[t]he Court of Appeals in this case ignored unambiguous limitations on taxpayer and citizen standing[]”, apparently “out of the conviction that en-

Rights Mobilization, Inc. v. Regan, 544 F. Supp. 471 (S.D.N.Y. 1982) (“ARM I”) reaffirmed its original holding on this point, notwithstanding this Court’s decision in *Allen v. Wright (Abortion Rights Mobilization, Inc. v. Regan)*, 603 F. Supp. 970 (S.D.N.Y. 1985) (“ARM III”), twice refused to certify on interlocutory appeal on the jurisdictional issue (*Abortion Rights Mobilization, Inc. v. Regan*, 552 F. Supp. 364 (S.D.N.Y. 1982) (“ARM II”); see *Abortion Rights Mobilization, Inc. v. Baker*, 110 F.R.D. 337, 338 (S.D.N.Y. 1986) (noting second denial of certification)), and was proceeding with discovery as to the merits. See generally 110 F.R.D. at 338-39.

forcement of the Establishment Clause demands special exceptions from the requirement that a plaintiff allege distinct and palpable injury to himself that is likely to be redressed if the requested relief is granted.” 454 U.S. at 488 (original quotation marks and citations omitted). This Court found that such a vision of standing had “no merit” (*id.* at 488, n.25), and rested on the philosophy that the Article III “cases and controversies” limitation on the jurisdiction of federal courts is a mere inconvenient nuisance to be disposed of when it becomes a barrier to litigation of interesting constitutional questions. But, as the Court noted, “[t]his philosophy has no place in our constitutional scheme. It does not become more palatable when the underlying merits concern the Establishment Clause.” *Id.* at 489. Plaintiffs-respondents’ standing cannot be predicated on the bare fact that an establishment clause violation is being alleged, but must involve a more particularized claim of specific *injury* thought to result from such a violation.

B. Plaintiffs-Respondents Identify No Cognizable Injury Suffered As A Result Of Alleged Unconstitutional Government Action

Like the ideologically-motivated plaintiffs in *Valley Forge*, the clergy plaintiffs and plaintiff-respondent Women’s Center for Reproductive Health here have “failed to identify any personal injury suffered by them as a consequence of the alleged constitutional error”. *Id.* at 485 (emphasis omitted). The two such conceivable injuries in this case are a “stigmatic” injury of official disapprobation of plaintiffs-respondents’ religion (or lack thereof) or a “taxpayer” injury under *Flast v. Cohen*, 392 U.S. 83 (1968). Neither allegation is sufficient to create an Article III “case or controversy” on the facts of this case.

The “stigmatic” or “denigration” injury asserted by plaintiffs-respondents here as arising under the establishment clause differs in no material respect from the stig-

matic or denigration injury asserted by the plaintiff class in *Allen* as arising under generalized principles of equal protection.⁸ Plaintiffs-respondents' allegation of stigmatic injury here is insufficient to confer Article III jurisdiction for the same reason such allegations were insufficient in *Allen*: generalized, nonspecific claims of stigmatic injury or denigration, suffered in common by all members of a particular class or group of citizens (468 U.S. at 753-54) are insufficient to confer Article III jurisdiction. *Id.* at 754-56. See also *id.* at 751 (prohibition on adjudication of "generalized grievances more appropriately addressed in the representative branches.").

Here, as in *Allen*, the consequences of recognizing respondents' standing on the basis of their allegation of stigmatic or denigration injury "illustrate why [this Court's] cases plainly hold that such injury is not judicially cognizable." 468 U.S. at 755. The Court explained:

If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school. All such persons could claim the same sort of abstract stigmatic injury respondents assert in their first claim of injury. A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine. Recognition of standing in such circumstances would transform the federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States v. SCRAP*, 412 U.S. 669, 687, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973).

⁸ The Court in *Allen* assumed, without deciding, that the government conduct in question—alleged unlawful failure to withdraw tax-exempt status from racially discriminatory private schools—was the equivalent of Government discrimination. 468 U.S. at 754, n.20.

Constitutional limits on the role of the federal courts preclude such a transformation.

Id. at 755-56 (footnote omitted).

There is no reason why these same concerns would not apply to "abstract stigmatic injury" (*id.* at 755) predicated on allegations of religious, rather than racial, disapprobation ostensibly flowing from government action or inaction. Were such an injury cognizable, "standing would extend nationwide" to persons of any religion—or simply any moral viewpoint—to challenge the government's "grant of a tax exemption to [a politically active church], regardless of the location of that [church]." *Id.* at 755-56. An Adventist, Methodist or Atheist in Hawaii could challenge the tax-exempt status of a religious body in Maine with which he has differences of political opinion, transforming federal courts into debating fora for airing the grievances of bystanders. *Cf. id.* at 755-56.

This Court's cases involving Article III limitations in establishment clause lawsuits reflect the same rule as articulated in *Allen*.⁹ Indeed, the *Allen* Court relied in part on *Valley Forge* for the rationale quoted above:

⁹ But cf. *Walz v. Tax Commission*, 397 U.S. 664 (1970) (rejecting on the merits constitutional challenge to state property tax exemption of churches; standing apparently assumed). There is a certain tension between *Walz* and *Allen v. Wright*, which we think best explained by a combination of (1) lack of close examination of the potential standing problem in *Walz* (*cf. Allen*, 468 U.S. at 735-36 (distinguishing *Coit v. Green*, 404 U.S. 997 (1971), as being of little precedential importance where standing question not explicitly considered in summary affirmance); and (2) the fact that the law of standing has been considerably refined and clarified since *Walz*. Compare *Allen v. Wright* (1984) and *Valley Forge* (1982), with *Flast v. Cohen*, 392 U.S. 83 (1968). We submit that, were *Walz* to be adjudicated today, it would be appropriately analyzed under the methodology of *Allen*, *Valley Forge* and *Simon*, with the threshold issue of justiciability receiving greater attention.

At all events, *Walz* is distinguishable from the instant case on the ground that the plaintiffs in *Walz* alleged a "taxpayer injury" and

Were we to recognize standing premised on an 'injury' consisting solely of an alleged violation of a "'personal constitutional right' to a government that does not establish religion," a principled consistency would dictate recognition of respondents' standing to challenge execution of every capital sentence on the basis of a personal right to a government that does not impose cruel and unusual punishment, or standing to challenge every affirmative-action program on the basis of a personal right to a government that does not deny equal protection of the laws, to choose but two among as many possible examples as there are commands in the Constitution."

Valley Forge, 454 U.S. at 489-90, n.26; accord, *Allen v. Wright*, 468 U.S. at 756, n.21 (quoting with approval).

This is not to dispute that "stigmatic" or "denigration" injury is relevant to the substantive determination of an enactment's constitutionality under the establishment clause; on the contrary, such an inquiry plays a central role in the analysis. See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (relevant question in establishment clause cases whether government communicates message of either endorsement or disapproval of religion); *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985) (citing O'Connor position with approval). But *Valley Forge* makes clear that this injury, to be cognizable by federal courts, must consist of something "other than the psychological consequence presumably produced by observation of conduct with which one disagrees." 454 U.S. at 485. Rather, as in *Allen*, a plaintiff must allege "a stigmatic injury suffered as a direct result of *having personally been denied equal treatment*." *Allen*, 468 U.S. at 755 (emphasis added).

In short, while this Court's establishment clauses cases recognize that whether a given practice communicates a

plaintiffs-respondents here allege a "political process injury" unrelated to their status as taxpayers. See *infra* at 19-20 & n.10.

generalized message of endorsement or disapproval of some religion (or religion in general) is a highly relevant inquiry *on the merits*, a litigant's *standing* to invoke the jurisdiction of an Article III court *always*—no less in establishment clause cases than in any other kind of case—depends on the existence of some distinct, palpable and remediable injury *personal to him*. *Valley Forge*, 454 U.S. at 489. The classic examples of such personal injuries recognized by this Court's establishment clause decisions are compulsory taxation for allegedly unconstitutional spending programs (e.g., *Flast v. Cohen*, 392 U.S. 83 (1968); cf., e.g., *Aguilar v. Felton*, 473 U.S. 402 (1985)); and compelled participation in allegedly unconstitutional religious activity or observance (e.g., *Wallace v. Jaffree*, 472 U.S. 38; *Abington School District v. Schempp*, 372 U.S. 203 (1963); cf., e.g., *Lynch v. Donnelly*, 465 U.S. 668 (1984)).

In our view, the first category—taxation for unconstitutional spending—is properly a special case of the second, more general category of *government-compelled participation in religious activity*, which is the essence of an establishment clause violation and the injury that results to individuals from such a violation. Taxpayer standing is recognized in certain establishment clause cases because taxation for unconstitutional spending sometimes can be considered a form of coerced participation in religious activity. We think this the soundest reading of *Flast v. Cohen*, 392 U.S. 83 (1968), in light of the Court's subsequent decision in *Valley Forge*. To the extent *Flast* retains any continuing validity, it stands for this somewhat more focused proposition, which in candor must be conceded to be narrower than the formulation of the Court in *Flast* itself.¹⁰

¹⁰ We believe this case does not call for a reexamination of *Flast*, since, as explained in the text, plaintiffs-respondents' status as *taxpayers* lacks the requisite nexus required by *Flast* to the nature

Similarly, the inquiry into whether a program challenged under the establishment clause conveys a message of governmental endorsement or disapproval of religion

of the *injuries* they assert as a consequence of the constitutional infringement alleged (see 392 U.S. at 102)—in this case, a “denigration” or “political distortion” injury, not a taxpayer injury. Indeed, plaintiffs-respondents abandoned early on any reliance on taxpayer standing as a theory distinct from a more general establishment clause standing (*Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471, 476 n.1 (S.D.N.Y. 1982)), and it should not now be considered as an alternative ground for affirmance. In any event, plaintiffs-respondents are not challenging Congress’s action under the taxing and spending power in enacting § 501(c)(3), but rather alleged insufficient enforcement of the terms of that statute *by the Executive Branch*. The challenge is not “‘made to an exercise *by Congress* of its power under Art. I, § 8, to spend for the general welfare’”, *Valley Forge*, 454 U.S. at 479 (quoting *Flast*, 392 U.S. at 103 (emphasis added)), but rather is made to decisions of the Executive Branch as to investigation and enforcement of the tax laws. See *Allen v. Wright*, 468 U.S. at 760; *Valley Forge*, 454 U.S. at 479.

Should the Court deem it appropriate to reconsider *Flast*, however, we would point out that taxpayer standing in establishment clause cases is *unnecessary* in order to provide a vehicle for the vindication of religious liberty through the courts, and actually *distorts* the nature of the religious liberty interests protected by the establishment clause, in the course of litigation of such issues. The allegation of injury that should give rise to standing to sue in establishment clause cases is *official compulsion to participate in some exercise of religion, by imposing a burden on the nonexercise of religion*. As one commentator has noted, “the establishment clause is a safeguard against compelled or induced exercise of religion by means direct and indirect, one of which might in practice prove to be through the pocketbook; but the establishment clause is not a *pocketbook right*.” Paulsen, “Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication,” 61 Notre Dame L. Rev. 311, 355 (1986) (emphasis in original). We think a good faith claim of injury to *religious freedom* is both a necessary and sufficient condition for the proper adjudication and vindication of establishment clause claims in federal courts; a litigant’s status as a taxpayer adds little or nothing to the proper analysis.

recognizes that such messages may exercise a subtle coercive effect on freedom of religious exercise. *Wallace*, 472 U.S. at 70 (O’Connor, J., concurring) (government “endorsement” of a particular religious practice or viewpoint “infringes the religious liberty of the non-adherent” through indirect coercive pressure upon religious minorities to conform). In any event, coercion in some form or another can be seen as the essence of an establishment clause claim. McConnell, “Coercion: The Lost Element of Establishment”, 27 Wm. & Mary L. Rev. 933 (1986). *But cf. Abington School District v. Schempp*, 374 U.S. at 233 (dictum). And, in our view, it follows that a *particularized* claim of coercion to participate in religious activity is required for an individual to raise an establishment clause challenge in an Article III court.

Plaintiffs-respondents have made no plausible allegation of any form of religious coercion resulting from government conduct, on the facts of this case. Plaintiffs-respondents are in no way compelled or pressured to participate in state-sponsored religious activity, or to exercise, honor, or support some or any religion other than one of their own choosing. The most charitable reading of plaintiffs-respondents’ allegations is that there is indirect coercion in the form of a denial of equal treatment in the political sphere. *Cf. Lynch*, 468 U.S. at 692 (O’Connor, J., concurring); *Heckler v. Matthews*, 465 U.S. 728 (1984). But even on such a reading, the most that plaintiffs-respondents claim is a generalized, non-specific “distortion” of the political process, not that all or any of them have “personally been denied equal treatment” (*Allen*, 468 U.S. at 755 (distinguishing *Heckler v. Matthews*)) or been coerced or pressured into exercising a religion or adopting a religious viewpoint other than one of their own choosing, because of the alleged nonenforcement against other exempt organizations of 26 U.S.C. § 501(c)(3) restrictions on political activity.

If the *Flast* rule is regarded as a specialized example of this more general category of government compulsion

in matters of religion, applicable where the alleged coercion of religious activity consists of religious taxation, the lack of merit in plaintiffs-respondents allegations is immediately evident. But even if *Flast* properly identifies a taxpayer injury wholly apart from a claimed infringement of religious liberty, applying *Flast's* "two-stage nexus" test reveals plaintiffs-respondents lack of standing with equal clarity. Simply stated, there is no sufficient logical nexus between plaintiffs-respondents alleged injury—"distortion" of the political process—and "the substantive character of the statute or regulation at issue." *Diamond v. Charles*, 106 S.Ct. at 1707. See *Flast*, 392 U.S. at 102-03. Surely the tax statute at issue creates no cause of action, express or implied, in favor of these particular clergymen¹¹ or the Women's Center for Reproductive Health, nor is there generally a right of action for third-parties to challenge or compel executive enforcement of tax laws. *Allen v. Wright*, 468 U.S. at 760 (collecting cases); See *Marbury v. Madison*, 5 U.S. (1 Cranch) at 169-171 (federal courts lack constitutional power to issue orders to the Executive Branch directing them to take certain actions that are within the discretionary discharge of their duties); *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).¹² More broadly, there is no

¹¹ The churches of which the clergy plaintiffs-respondents are pastors are tax-exempt under the same statutory provision applied to petitioners (26 U.S.C. § 501(c)(3)). These clergymen are equally free to teach as part of their sincere explanation of religious doctrine a viewpoint on social and moral issues contrary to that held by petitioners as an incident of petitioners' religious convictions. There can be no doubt that the clergy plaintiffs-respondents allege no impairment of their freedom of religious speech and exercise.

¹² While Congress may create legal "standing" by creating a statutory cause of action for private parties, it clearly has not done so in the area of administration of the tax laws. Indeed, perhaps more clearly than in most areas of federal law, Congress has expressed precisely the opposite intention. See, e.g., 26 U.S.C. § 7421(a) (barring taxpayer suits to restrain tax assessment or

logical nexus between any of plaintiffs-respondents various assertions of injury—"denigration" and distortion of the political process—and their status as taxpayers. Whatever else the "denigration" or "distortion" injuries might be, they are certainly not injuries that harm a taxpayer *qua* taxpayer.

Plaintiffs-respondents do not and could not assert any injury to their freedom of religious exercise or non-exercise arising from their status as taxpayers. Rather, they assert a generalized distortion of the political process in favor of petitioners, arising from alleged nonenforcement of statutory restrictions on political activity, and injuring them in a way that has essentially nothing to do with their taxpayer status.

In sum, the "denigration" or "stigmatic" injury is insufficient to create a justiciable controversy, under *Allen v. Wright*; neither the "denigration" nor "distortion" allegations can provide taxpayer standing under *Flast v. Cohen*; and the establishment clause contains no broad-brush exception to Article III limitations on the power of federal courts to entertain lawsuits. Petitioners' challenge to the district court's Article III jurisdiction must therefore prevail under the rule of *Allen v. Wright*, and the judgments of the lower courts accordingly should be reversed.

collection); 26 U.S.C. § 7801(a) (specific delegation of authority to Executive Branch officials to enforce and administer tax laws). Congress plainly intended the administration of the tax code, not excluding the granting and revocation of exempt status under § 501(c)(3), to be within the discretion of the Executive Branch, not private attorneys general. There is nothing in the code or its legislative history to suggest an intention to create a statutory cause of action for the benefit of third parties like plaintiffs-respondents.

CONCLUSION

The judgment of the court of appeals should be reversed, with directions that the district court dismiss the complaint.

Respectfully submitted,

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No. 87-416

Supreme Court, U.S.

FILED

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In The
Supreme Court of the United States
October Term, 1987

UNITED STATES CATHOLIC CONFERENCE

and

NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Petitioners,

v.

ABORTION RIGHTS MOBILIZATION, INC.,

and

JAMES A. BAKER, III, SECRETARY OF THE TREASURY, and
LAWRENCE B. GIBBS, COMMISSIONER OF INTERNAL REVENUE,
Respondents.

On Certiorari to the Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL COUNCIL OF
CHURCHES OF CHRIST IN THE U.S.A., THE AMERICAN
JEWISH CONGRESS, JAMES E. ANDREWS AS STATED CLERK
OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN
CHURCH (U.S.A.), THE BAPTIST JOINT COMMITTEE ON
PUBLIC AFFAIRS, THE CATHOLIC LEAGUE FOR RELIGIOUS
AND CIVIL RIGHTS, THE CHURCH OF JESUS CHRIST OF
LATTER-DAY SAINTS, THE LUTHERAN CHURCH-MISSOURI
SYNOD, THE NATIONAL ASSOCIATION OF EVANGELICALS,
THE SYNAGOGUE COUNCIL OF AMERICA, AND THE
WORLDWIDE CHURCH OF GOD, IN SUPPORT OF PETI-
TIONERS

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QUESTIONS PRESENTED

Whether an order holding a major religious body in civil contempt and imposing substantial fines for refusal to comply with massive discovery requests for sensitive internal church records should be vacated for want of subject matter jurisdiction because the plaintiffs lack standing, either as voters or as members of the clergy, to challenge directly the tax-exempt status of the religious body.

Whether a major religious body held in civil contempt may be denied standing as a witness to challenge the underlying jurisdiction of the federal court that ordered the discovery that triggered the contempt citation, on the view that "colorable" jurisdiction suffices to postpone consideration of the church's jurisdictional challenge until the requested discovery of the church's records is completed and the underlying action to revoke the tax-exempt status of the church is decided on the merits.

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STATEMENT OF INTERESTS

Amici curiae are major religious bodies in the United States or membership organizations concerned with the preservation of religious freedom. This brief is directed to the profound implications of this case for religious freedom. Every aspect of this case, including the substantive theory of the plaintiff's case, threatens core values of the Religion Clause. The autonomy and integrity of all religious bodies is threatened by conferring standing on private parties hostile to the moral teaching of a target church to litigate to revoke the exempt status of that religious body. (Part I, *infra*). The freedom of religious bodies is likewise threatened by denying appellate standing to a church held in civil contempt until the discovery of its internal records has been completed by hostile outsiders and a decision has been reached on the merits of the claims of these outsiders. (Part II, *infra*). Indeed, religious freedom suffers from the very court orders that the church is attempting to appeal in this case, for those orders purport to compel massive discovery of sensitive internal church records by ideological opponents of the church and to enforce the discovery order by a contempt citation imposing coercive fines on the church for its refusal to comply with the discovery order. (Part III, *infra*). From beginning to end, this case is a First Amendment nightmare. Amici hold widely varying views on the ethics of abortion, but are in concerted agreement on these First Amendment issues.

These First Amendment issues are adequately preserved in the record of this case. The petitioners, however, have chosen to present this case to this Court pri-

marily as a technical matter of standing, without focusing in detail on the claims arising under the Religion Clause. This Court may decide the case as the petitioners have presented it, but amici urge that it consider the standing issues in light of First Amendment considerations set forth in this brief. In a case so pervaded with sensitive issues arising under the Religion Clause, there is an enormous risk of dictum which may later be taken to preclude or limit further consideration of these issues. This brief informs this Court of the First Amendment implications of this case.

If this Court decides the case on the narrow ground suggested by the petitioners, amici urge this Court to limit its opinion carefully by reserving the question of intrusive civil discovery of the internal records of a religious body, and by refraining from dicta that would serve in any way to diminish the associational privacy of religious bodies by broadening the access of hostile outsiders to their internal records. If this Court decides the case on the narrow ground suggested by the petitioners, amici likewise urge this Court to reserve the question of the imposition of excessive fines on a religious body, and to refrain from any dicta that would serve to diminish the legitimate autonomy of religious bodies by expanding judicial power over these bodies where less restrictive alternatives (e.g., certification of the ruling on the standing of the plaintiffs for an interlocutory appeal) would serve any interest which may be asserted on behalf of orderly administration of justice and would obviate inquiry into whether the interest in behalf of the contempt order in this case was truly "compelling."

Counsel for petitioners and respondents have granted consent to the filing of this brief. The particular statement of interest of each amicus participating in this brief is contained in the appendix.

SUMMARY OF ARGUMENT

Amici are interested in the correct resolution of four mistakes in this case affecting religious freedom. The first two mistakes relate to the legal standing of the petitioners and the private respondents. The other two mistakes concern the threat to the autonomy and integrity of all religious bodies posed by the court order of discovery of sensitive internal records of a major religious denomination and by the imposition of coercive fines on that church in unprecedented severity. None of these constitutional errors is "harmless."

The first standing mistake was the ruling of the district court that the private respondents (plaintiffs below) *have standing*, either as voters or as members of the clergy, to challenge the tax-exempt status of a major religious organization. This mistake enlarges the power of the judiciary and diminishes the role of the executive over the administration of federal tax policy in a manner directly contrary both to the requirements of the constitution and to the clear intent of Congress. (Part I)

The second standing mistake was the ruling of the court of appeals that the petitioners *lack standing* as witnesses to challenge the subject matter jurisdiction of

the federal court to enter a compulsory discovery order against a religious body, and to hold the church in civil contempt for its refusal to comply with the discovery order. This mistake bootstraps the governmental interest in efficient administration of criminal justice into an undifferentiated and unreviewable power over religious bodies in a civil suit, on a record where it is plain that the church had no legal mechanism available to it other than civil contempt in order to seek appellate review of the first standing mistake. (Part II)

Religious freedom was also jeopardized by the ruling of the district court requiring the petitioners to hand over to the plaintiffs *massive amounts of sensitive internal church records*. These records include confidential tax returns which the private respondents may not obtain from the federal respondents because Congress has expressly prohibited the executive from disclosing such information to anyone, let alone to the political adversaries of a not-for-profit religious organization. Religious freedom was also threatened by the raw judicial power of the district court in holding a major religious body in civil contempt and in imposing *finest in the amount of \$100,000 per day on the church petitioners* for each day in which they refuse to comply with the court's compulsory discovery order. (Part III)

ARGUMENT

I. THE SENSITIVE TASK OF REVOCATION OF THE TAX-EXEMPT STATUS OF A NOT-FOR-PROFIT RELIGIOUS ORGANIZATION SHOULD NOT BE ENTRUSTED TO PRIVATE THIRD PARTIES WHO MAY ACT MERELY BECAUSE THEY DO NOT AGREE WITH THE RELIGIOUS MESSAGE OF THE EX-EMPT ORGANIZATION.

Although this case is fraught with First Amendment difficulties of the highest magnitude, the standing issues are the principal matters now before this Court, and it is understandable that this Court may seek a narrow ground for disposing of this case. In the view of the amici, however, the correct disposition of these standing issues requires at least an awareness of the pernicious consequences to religious freedom and to the associational rights of religious communities which flow from the rulings of the courts below. The underlying reason for the petitioners' reluctant decision to allow itself to be held in contempt of court is its conviction, based on the advice of its legal counsel, that the district court lacks jurisdiction over the subject matter, and therefore is without power to enforce the subpoenas duces tecum of the plaintiffs, private third parties who attack the tax-exempt status of the church. In the petition for certiorari and brief in opposition, the parties discuss this case as though it presented an unadorned matter of standing. Amici urge that this Court view these standing matters through First Amendment lenses, in order to see the full seriousness of allowing the federal courts to be used by opponents of religious bodies to strip them of their exempt status.

The first standing mistake was the ruling of the district court that the private respondents (plaintiffs below) *have standing*, either as voters, *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471, 480-482 (S.D.N.Y. 1982), A. 69a-74a, or as members of the clergy, *id.* at 478-479, A. 67a-69a, to challenge the tax-exempt status of a major religious denomination, on the view that the federal respondents had allegedly “denigrated” the plaintiffs’ religious beliefs and “frustrated” their ministry by giving “tacit government endorsement of the Roman Catholic Church view of abortion.”

The second standing mistake was the ruling of the court of appeals that the petitioners *lack standing* as witnesses to seek appellate review of the jurisdiction of the federal court to enter a compulsory discovery order massive in scope against a religious body, and to hold the church in civil contempt for its refusal to comply with the discovery order. (See II, *infra*). Both of these standing errors represent significant departures from the binding precedents of this Court,¹ and are addressed fully in the briefs of the petitioners and the federal respondents.² Al-

¹ See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *United States v. Richardson*, 418 U.S. 166 (1972); and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1972).

² In this case the federal respondents agree with the petitioners that the district court lacks subject matter jurisdiction. Indeed, the government has sought review of this very issue in the court of appeals and this Court on repeated occasions. See, e.g., Briefs of the United States in Nos. 86-157 and 86-162.

though it is extremely unlikely that the petitioners in this particular case will modify their teaching on abortion, no matter what the outcome of the lawsuit, amici urge that the very threat of such litigation may impact severely on the ability of not-for-profit religious organizations to communicate their varying messages on matters of public concern.³ For these reasons amici urge this Court to reverse the decisions below on the standing issues.

A. The District Court erred in Conferring Standing on the Private Respondents (Plaintiffs below) to Challenge the Exempt Status of a Major Religious Organization on the Grounds that the Plaintiffs are either Voters or Members of the Clergy.

This Court has clarified repeatedly that in order to have standing, a plaintiff must demonstrate actual or threatened injury that can fairly be “traced to the challenged action” and “is likely to be redressed by a favorable decision,” *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). Like this case, *Simon* involved a challenge to the tax-exempt status of third party organizations. In *Simon* this Court refused to find a causal link between a revenue ruling under I.R.C. § 501(c)(3) and a reduction in services to indigents. The *Simon*

³ As is evident from the statement of interests of the amici, some of the amici agree with the position of the petitioners on the abortion issue and others do not. Nonetheless, all of the amici are of one mind that in the American constitutional order a religious body must be free to address matters of public policy without being subjected on that account to harassing litigation by outsiders. For example, the American Jewish Congress and the Presbyterian Church should not be exposed to costly litigation by right to life advocates who might, under the theory advanced by the plaintiffs in the instant case, attack the exempt status of these organizations for allegedly excessive involvement in the political order on the opposite side of the abortion issue.

Court ruled that “[i]t is purely speculative whether the denials of service specified in the complaint fairly could be traced to petitioners’ encouragement or instead result from decisions made by the hospitals without regard to the tax implications,” *Id.* at 42-43. In *Allen v. Wright*, 468 U.S. 737 (1984), this Court held that even if a plaintiff has sustained an injury, standing is still deficient where “the injury alleged is not fairly traceable to the Government’s conduct . . . challenge[d] as unlawful.” *Id.* at 757. The *Allen* Court reasoned that it was “entirely speculative whether withdrawal of the tax exemption of racially discriminatory schools would have any impact on the ability of respondents’ children to receive a desegregated education.” *Id.* at 758.

(i) Voter Standing

Ignoring the dictates of *Simon* and *Allen*, the district court conferred standing on the plaintiffs in their capacity as voters, on the view that they have somehow been disadvantaged by the federal respondents’ alleged “preferential treatment” of the church. The fallacious premise for this view is that taxed contributions translate into less voting power than non-taxed contributions. This analysis is flawed for two reasons. First, the plaintiffs have not experienced a cognizable injury in their capacity as voters. The actual voting power of each individual plaintiff at the polling place is not in the least restricted by campaign activities, whether conducted by taxed or tax-exempt organizations. The plaintiffs’ votes are no less significant than those of other voters. *Baker v. Carr*, 369 U.S. 186, 208 (1962).

Second, even if it were assumed that the plaintiffs in this case had suffered some palpable injury to their rights

of franchise, the injury was not caused by the actions of the government, as it was in *Baker v. Carr*, *supra*. The injury claimed is the purported “added influence” that the Catholic church has because of deductible contributions which it may spend on campaigns opposing abortion. This claimed injury is actually traceable neither to the federal respondents nor even to the petitioners, but to third party taxpayers who choose voluntarily to make charitable contributions to the petitioners. It is purely conjectural to believe that taxing these charitable gifts will in any significant way diminish voluntary giving to that church.⁴ It is still more speculative to imagine that taxing these gifts would in any significant way decrease that church’s efforts to influence abortion policy in this country, for the church’s campaign against abortion is grounded in sincerely held religious beliefs. Because the claimed injury to voting rights is not cognizable injury which is traceable to governmental action or redressable by a court order, it is insufficient to confer standing on the private respondents in their capacity as voters to challenge the exempt status of the petitioners.

The remedy sought by the plaintiffs as voters, moreover, does not advance the First Amendment goal of affording more voices to be heard in our democracy. To the contrary, it seeks to penalize those who espouse a viewpoint on a public controversy different from that of the plaintiffs, and thus would have the effect of diminishing the flow of information to voters and to elected represen-

⁴ The hypothetical character of the plaintiffs’ claim is underscored by the fact that the majority of taxpayers (60.8% in tax year 1985) do not itemize charitable contributions, but prefer to take the standard deduction. *IRS Statistics of Income Division Bulletin 1* (Winter 1986-87). With the increase of the standard deduction in the Tax Reform Act of 1986, tax analysts expect a further decrease in the number of taxpayers who itemize.

tatives. Allowing voters to resort to the courts to revoke the exempt status of a religious body because of its dissemination of views on matters of public concern has the inevitable effect of chilling the expression of moral views which have ramifications in public policy choices. Although a sound argument may be advanced for allowing voters greater access to the judiciary in order to ensure *fuller participation in the political process by all*, see, e.g., J. Ely, *Democracy and Distrust* 105-125 (1980), it makes no sense to expand the power of the nonpolitical branch to issue rulings that have the effect of chilling or *diminishing the pluralistic character of debate* on matters of public concern. For this reason as well, this Court should reverse the conclusion that plaintiffs have standing as voters to challenge the exempt status of the petitioners.

(ii) Clergy Standing

The district court likewise erred in conferring standing on the clergy plaintiffs on the view that the protected activity of the petitioners violates the rights of these clergy plaintiffs secured under the Establishment Clause. This conclusion is erroneous for three reasons. First, the mere fact that a plaintiff seeks relief under the Establishment Clause does not mean that the normal requirements for standing are diminished. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982). Important as the prohibition against governmental establishment of religion is in our society, it nonetheless remains true that not "all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974).

Second, a plaintiff must show direct and palpable injury caused by the illegal conduct of the defendant, not

mere psychological distress that one's view of the constitutional order has been offended. In *Valley Forge* the Court held that the plaintiffs lacked standing because they "fail[ed] to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. Similarly in *Allen*, *supra*, this Court denied standing to black parents who claimed that they suffered "stigmatic" injury because of the tax-exempt status of segregated private schools, on the view that the alleged injury was too abstract to fulfill standing requirements. 468 U.S. at 754-56.⁵

Mere mechanical pleadings raising claims of abstract stigmatic injury are not enough to expose a not-for-profit religious organization to costly litigation initiated by its ideological adversaries. The claimed injury to the clergy in this case is as intangible as the "psychological" injury found insufficient to confer standing in *Valley Forge* and the "abstract stigmatic" injury addressed in *Allen*. The extent of the "injury" to these members of the clergy is easy to assert, but difficult if not impossible to measure. Thus it is hard to imagine how the ability of the clergy plaintiffs to minister to their flocks could be helped in any significant way by the outcome of this liti-

⁵ Although *Allen* seems plainly to require the result that the private respondents lack standing, the district court in *Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. 970 (S.D.N.Y. 1985), A. 93a-102a, expressly declined to modify its earlier ruling on voter and clergy member standing in the light of *Allen*, or even to certify the standing matter for purposes of an interlocutory appeal by the petitioners. The district court's refusal to certify its rulings on this matter for interlocutory appeal triggered the contempt proceedings as the only legal mechanism available to the petitioners to challenge the jurisdiction of the court to order massive discovery of sensitive internal church records. See Part III B, *infra*.

gation, for the plaintiffs are not seeking restoration of tax-exempt status for themselves, but the revocation of the exempt status of a third party.

Third, the substantive theory of the plaintiffs' case is based on the view that the severe restrictions on political speech imposed by I.R.C. § 501(c)(3) on exempt organizations are required by the First Amendment. Amended Complaint, par. 16 & 17.⁶ It is, however, contrary to the clear teaching of this Court, *Walz v. Tax Commission*, 397 U.S. 664 (1970), to suppose that the grant of tax-exempt status to a religious body constitutes, as the district court imagined, impermissible "government endorsement of the Roman Catholic Church view of abortion," A. 67a, or "official approval of an orthodoxy." A. 68a.⁷ And it is equally fanciful to suppose that the federal

⁶ In their brief before the court of appeals, plaintiffs urged that this result is required by the holding in *Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973). Congress, however, expressly declined to give its approval or disapproval to the rationale for § 501(c)(3) in *Christian Echoes*, Tax Reform Act of 1976, § 1307(b)(3), Pub. L. 84-455, 90 Stat. 1722.

Plaintiffs also rely on this Court's ruling in *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), and *Cammarano v. United States*, 358 U.S. 498 (1959). Neither of these two tax cases, however, involved a religious body attempting to communicate its religious message on matters of public concern. *Taxation With Representation*, moreover, is not directly controlling because the "saving" feature of I.R.C. 501, viz., 501(c)(4), is of no practical use to a preacher, who cannot be required to announce at the beginning of a sermon whether he is speaking for a 501(c)(3) church or a 501(c)(4) clone, let alone to switch birettas or yarmulkes in the midst of such a sermon.

⁷ In *Walz* this Court sustained tax exemption for property used exclusively for religious worship, on the view that, far from establishing religion, this practice avoided governmental interference with religion. In addition, the Court expressly noted: "Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this

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respondents have impliedly "denigrated" the religious beliefs of the plaintiffs who are members of the clergy or that the Secretary of the Treasury and the Commissioner of the IRS have in any way "frustrated" the ministry of those plaintiffs. On this record it is all too plain who is attempting to frustrate whom. It is the plaintiffs whose constitutional theory undermine the necessary degree of flexibility or "room for play in the joints" deemed appropriate in *Walz*, 397 U.S. at 669.⁸ Although the plaintiffs who are clergy members may subjectively feel that their beliefs are "denigrated" by the tax-exempt status of the Catholic church, that is not enough to establish standing under this Court's teaching in either *Simon* or *Allen*. It is, moreover, entirely speculative to conclude, as the district court did, that the revocation of the tax-exempt status of a religious body necessarily marks its decline in

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case reveals in the several briefs amici, vigorous advocacy of legal or constitutional positions. Of course, churches as secular bodies and private citizens have that right." *Id.* at 670.

⁸ It is difficult to conceive of greater rigidity than to give to any opponent of the teachings of a religious body access to federal court to seek an injunction to compel the revocation of that church's exemption from the payment of federal income tax and a whole series of cascading events flowing from the loss of that status. With the loss of exempt status under I.R.C. § 501(c)(3), a religious body would not only have to pay taxes on all net income, but all contributions to the church would no longer be deductible by the contributing taxpayer for purposes of federal income tax, I.R.C. § 170(c)(2)(D), estate tax, I.R.C. §§ 2055(a)(2) and 2106(a)(2)(A)(ii), and gift tax, I.R.C. § 2522(a)(2). In addition, most of the states have parallel provisions in their tax codes which incorporate I.R.C. § 501(c)(3) by reference, for purposes of determining the exemption of a religious body from payment of a wide variety of state and local taxes. Some states, moreover, predicate their regulatory authority over an entity seeking charitable contributions on the entity's federal tax-exempt status, conferring, for example, an exemption from annual reporting requirements to groups which are exempt under § 501(c)(3).

influence; this belief ignores the myriad of factors that influence the moral vitality of a religious community.

Like others who favor abortion, plaintiffs have First Amendment protection in advocating their views. As the diversity among religious bodies included among the amici demonstrates, the moral teaching of various religious bodies on abortion has not been contingent upon the teaching of the Catholic church on this matter, let alone on the even more attenuated question of whether that church enjoys tax-exempt status. The implication to the contrary in the district court's ruling in *ARM I* merely emphasizes the need for rules of standing that preclude the use of the federal courts for attacking religious organizations.

B. The Private Respondents Lack Statutory Standing because Congress has Entrusted to the Federal Respondents the Sensitive Task of Granting and Revoking the Tax-exempt Status of Charitable Organizations.

The standing requirement limits the jurisdiction of federal courts "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process," *Flast v. Cohen*, 392 U.S. 83, 97 (1968), and then only if Congress has conferred jurisdiction. Although plaintiffs have not claimed statutory standing, the basic posture that they occupy in this case is that of a private attorney-general seeking to compel enforcement of the tax law against a third party. Far from conferring statutory standing on the plaintiffs in this lawsuit, however, Congress has given several indications in the tax code that support the opposite conclusion.⁹ In short, Congress plainly intended

⁹ In the Anti-Injunction Act, I.R.C. § 7421(A), Congress prohibited suits to restrain assessment or collection of any tax,

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the administration of the code, including the granting and revocation of exempt status under § 501(c)(3), to be within the discretion of the federal respondents over whom Congress has a great deal of control through the oversight process, rather than within the boundless imagination of plaintiffs seeking to enforce their notions of tax equity in the federal courts.

The district court's view of standing, however, undermines the express intent of Congress by allowing private parties and the federal courts to usurp the role of both the legislative and executive branches, contrary to this Court's teaching in *Valley Forge* that Article III power is "not an unconditioned authority to determine the constitutionality of legislative or executive acts." 454 U.S. at 471. It is likewise clear under *Valley Forge* that the plaintiffs do not have "license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." 454 U.S. at 487. This Court should re-emphasize this teaching here, lest fundamental rights of religious autonomy be exposed to attack through lawsuits by hostile outsiders.

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whether brought by a taxpayer or, as here, by a third party. Congress has delegated the administration and enforcement of the tax laws exclusively to the Secretary and the Commissioner. I.R.C. § 7801(a). In addition, Congress gave to the federal respondents the power to "prescribe all needful rules and regulations for the enforcement of" those laws. I.R.C. § 7805(a). And Congress reserved for itself the task of overseeing the enforcement of the revenue laws by creating a Joint Committee on Taxation to investigate the administration, operation, and effects of the tax system (I.R.C. §§ 8001-8023). These provisions reflect congressional intent to operate the tax system within the legislative and executive branches. Congress, moreover, has expressly mandated that the IRS maintain the confidentiality of tax records, I.R.C. § 6103; and out of concern for the delicate character of religious freedom, Congress has expressly limited the power of the IRS to conduct audits of church bodies. I.R.C. § 7611.

Even when suits to compel the executive branch to undertake enforcement committed to its discretion are “premised on allegations of several instances of violations of law, [they] are rarely if ever appropriate for federal-court adjudication.” *Allen*, 468 U.S. at 759-760. Noting that an agency decision regarding enforcement proceedings “has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’ U.S. Const., art. II, § 3,” *Heckler v. Chaney*, 470 U.S. 821, 832 (1985), this Court has emphasized that executive agency decisions *not to enforce* are characteristically unsuitable for judicial resolution because this discretionary choice “often involves a complicated balancing of a number of factors which are peculiarly within its expertise.” *Id.* at 831.¹⁰ One of the reasons why Congress has entrusted delicate decisions concerning the exempt status of religious organizations to the federal respondents is that they take an oath of office to support the constitutional limits on their own authority. Private litigants with their own agenda are under no such obligation to take into account the protections of the First Amendment. If this case is any indication, the likelihood that disgruntled third parties will be sensitive to the free speech and free exercise concerns of non-profit organizations they oppose is slim. To the contrary, the probability

¹⁰ Unlike the district court in this case, this Court and the lower federal courts typically defer to determinations of the IRS concerning discretionary applications of the provisions of the tax code. See, e.g., *National Muffler Dealers Ass’n, Inc. v. United States*, 440 U.S. 472 (1979); *Tax Analysts and Advocates v. Blumenthal*, 566 F. 2d 130 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978); *American Society of Travel Agents, Inc. v. Blumenthal*, 566 F. 2d 145 (D.C. Cir. 1977), cert. denied, 435 U.S. 947 (1978).

that religious organizations will become the target of third parties hostile to their religious perspective is high.¹¹

The standing rule adopted by the district court could easily open up the floodgates to litigation against churches by those hostile to their mission or ideas. See, e.g., *Khalaf v. Regan*, 85-1 U.S. Tax Case Par. 9269 (D.D.C. 1985) (dismissing on standing principles effort of anti-zionist organization to revoke exempt status of Jewish charitable organizations because of their support of Israel); *American Society of Travel Agents, Inc. v. Blumenthal*, 566 F. 2d 145 (D.C. Cir. 1977), cert. denied, 435 U.S. 947 (1978) (dismissing on standing principles attack on exempt status of American Jewish Congress by business competitors). The potential for mischief of this sort, moreover, is compounded by the suggestion in *Bob Jones University v. United States*, 461 U.S. 574 (1983), that an exempt organization may lose its exempt status by failing to conform with “public policy,” *id.* at 586, or by failing to “be in harmony with the public interest” *id.* at 592; but see at 606-612 (Powell, J., concurring; rejecting suggestion that “primary function of exempt organizations is to act on behalf of the Government in carrying out governmentally approved policies”).

The district court’s approach to standing, moreover, is not limited to religious not-for-profit organizations, but could readily affect exempt charitable organizations which are secular in character. For example, a member of the Ku Klux Klan who is a registered voter could sue the

¹¹ Religious organizations may on occasion quarrel with the IRS over issues of governmental intrusion into areas deemed protected under the Religion Clause. See, e.g., D. Kelley, ed., *Government Intervention in Religious Affairs* (1982). But at least the known “devil” is better than unknown private adversaries whose name is “legion.”

Secretary of the Treasury to revoke the exempt status of the NAACP if the civil rights education fund were to participate in voter education deemed impermissible under the restrictive regulations in Rev. Rul. 78-248 (construing § 501(c)(3) to prohibit distribution of accurate information to voters if the voter guide focuses on a single issue such as land conservation). Similarly, opponents and proponents of gun control could use the courts rather than the halls of Congress and other legislative chambers to carry on their debates. Even if their suits were ultimately dismissed on the merits, they would have succeeded in obtaining valuable information about their opponents that would otherwise be unavailable to them.

As this record illustrates, significant harm to religious freedom may result from subjecting religious bodies to inquiries which violate their legitimate autonomy. (Part III, *infra*). See Laycock, "Towards a General Theory of the Religion Clauses," 81 Colum.L.Rev. 1373 (1981). The cost of defending such suits, moreover, represents a significant diversion of funds earmarked for charitable works. None of the amici construe the biblical command to feed the hungry (e.g., Isaiah 58:7; Matt. 25:35) to refer primarily to lawyers. At the very least, such diversion of funds cannot be justified on the basis of protecting litigants whose tax liability is not at issue, and will not be affected by the outcome of the litigation. For these reasons this Court should reverse the district court's erroneous ruling on standing.

II. WHERE A MAJOR RELIGIOUS BODY IS HELD IN CIVIL CONTEMPT AS A WITNESS IN EXEMPTION-REVOCATION PROCEEDINGS INITIATED BY OUTSIDERS HOSTILE TO ITS MESSAGE ON A MATTER OF PUBLIC CONCERN, THE CHURCH HAS STANDING TO SEEK APPELLATE REVIEW OF THE UNDERLYING JURISDICTION OF THE DISTRICT COURT TO ORDER DISCOVERY OF SENSITIVE INTERNAL DOCUMENTS.

The second standing mistake was the ruling of the court of appeals that the petitioners *lack standing* as witnesses to challenge the subject matter jurisdiction of the federal court to enter a compulsory discovery order against a religious body, and to hold the church in civil contempt for its refusal to comply with the discovery order. *In re United States Catholic Conference*, 824 F. 2d 156 (2d Cir. 1987). A. 1a-43a.¹² In reaching this result, the court of appeals virtually ignored the recent teaching of this Court in *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 106 S.Ct. 1326 (1986), that "*every* federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a case under review. . . .'" 106 S.Ct. at 1331 (emphasis added). Failing to distinguish an appeal from a contempt citation and a dilatory interlocutory appeal, the court of appeals asserted that the *Bender* rule is inapplicable to interlocutory appeals. The court of appeals devised a new rule of standing, according to which the petitioners' challenge to the power of the district court to or-

¹² On this record it is plain that subjecting itself to a civil contempt citation was the only available legal mechanism to seek appellate review of the first standing mistake "before undertaking any burden of compliance with the subpoena." *United States v. Ryan*, 402 U.S. 530, 533 (1971). See note 5 *supra*.

der massive discovery of the sensitive internal documents of a major religious body must fail if the appellate tribunal finds a modicum of "colorable" jurisdiction in the lower court.

The court of appeals justified this conclusion by extensive reliance on *Blair v. United States*, 250 U.S. 273 (1919), a case which did not involve a religious body, but a challenge to the authority of the grand jury by a crucial witness in a criminal investigation. Whatever the need for the *Blair* rule in the special context of grand jury investigations, it makes little sense to extend the rule into an undifferentiated and unreviewable power of private plaintiffs over religious bodies in a civil suit, especially where the government does not assert the interest at issue in *Blair*. Even if this case were a criminal prosecution of a bogus "church," the normal rule for the judiciary would be to defer to the discretion of the executive in conducting the prosecution. See, e.g., *United States v. Cox*, 342 F. 2d 167 (5th Cir. 1965) (en banc), cert. denied, 381 U.S. 935. But this is not a case in which the government is aligned against a religious body because of an alleged violation of the tax code. See, e.g., *Bob Jones University v. United States*, 461 U.S. 574 (1983). It is a case in which private parties seek to use the federal courts to inflict a penalty on a major religious body for the evident reason that they disagree with the moral teaching of that church on a controversial matter of public concern. Under these circumstances and in the light of *Heckler v. Chaney*, *supra*, this case is hardly an apt vehicle for extending the reach of the *Blair* rule to religious bodies which choose to speak out on matters of conscience that are controversial in nature.

III. RELIGIOUS FREEDOM IS THREATENED WHEN FEDERAL COURTS DENY ANY MEANINGFUL REVIEW OF SUBSTANTIAL FINES IMPOSED ON A CHURCH FOR REFUSING TO DISCLOSE SENSITIVE INTERNAL DOCUMENTS RELATING TO PASTORAL PLANS FOR CONSTITUTIONALLY PROTECTED MORAL ADVOCACY ON MATTERS OF PUBLIC CONCERN.

A. Communicating sincerely held religious convictions on matters of public concern is protected activity.

In the view of the private respondents, the severe restrictions on political speech imposed by I.R.C. § 501(c) (3) on exempt organizations are required by the First Amendment. Amended Complaint, par. 16 & 17. The underlying theory of the plaintiffs' case is that they must vindicate rights secured under the Establishment Clause because the federal respondents have failed to do so. In addition to the standing difficulties noted above, the major flaw with this theory is that this Court has clearly announced that, for Establishment Clause purposes, an exemption of religious bodies from the payment of taxes does not violate the First Amendment. *Walz v. Tax Commission*, 397 U.S. 664 (1970).¹³ In disposing of this case, this Court need not and, indeed, should not address the plaintiffs' contention that § 501(c)(3) is constitutionally mandated. If, however, this Court deems it prudent to discuss the constitutionality of § 501(c)(3) in dictum, amici urge that no truly compelling governmental interest supports these statutory restraints. To the contrary, in order to safeguard the functioning of our democracy, the con-

¹³ Contrary to the suggestion of the private respondents, this ruling was not disturbed in *Taxation with Representation*, *supra*.

stitution should foster greater freedom of political speech rather than its inhibition or suppression.¹⁴

It is well settled that any statute that significantly burdens free speech rights may be sustained only on a showing by the government that the statute serves a truly "compelling state interest" and that the means chosen by the government to achieve this end is the alternative which is the least restrictive of cherished free speech rights. See e.g., *Hobbie v. Unemployment Appeals Commission*, 480 U.S. —, 107 S.Ct. 1046, 1049 (1987). It is also well settled that religious bodies are afforded additional constitutional protection precisely because of their religious character. The protection of the Free Exercise Clause may be invoked only by persons or groups whose sincerely held *religious* tenets are burdened by governmental action. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Board*, 450 U.S. 707, 717-718 (1981). In the leading decision directly relating this teaching to tax benefits, *Speiser v. Randall*, 357 U.S. 513 (1958), this Court stated:

It is settled that speech can be effectively limited by exercise of the taxing power. . . . To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. *Id.* at 518.

Thus, far from being constitutionally compelled by the First Amendment, the restrictions on the political speech

¹⁴ In another case before this Court during this Term amici have expressed their views that the Religion and Free Speech Clauses afford substantial protection against extensive governmental regulation of a religious body that chooses to announce sincerely held religious beliefs directly relating to matters of public concern. See Amicus Brief of Baptist Joint Committee on Public Affairs et al., in *Bemis Pentecostal Church v. State*, app. pending, No. 87-317.

of religious organizations in § 501(c)(3) are themselves vulnerable to constitutional attack because they are by no means the alternative least restrictive of their rights secured under the Religion Clause and the Free Speech Clause. Indeed, it is difficult to imagine a restriction more total than the absolute prohibition on any participation by a 501(c)(3) organization in a political campaign, whether on behalf of or in opposition to a candidate for public office. See e.g., IRS Exempt Organizations Handbook (IRM 7751) § 3(10)1; and see Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii). It is likewise hard to imagine that IRS rulings virtually prohibiting voter education efforts by exempt organizations on topics of concern to the organization, see, e.g., Rev. Rul. 78-160, 1978-1 C.B. 153, revised by Rev. Rul. 78-248, 1978-1 C.B. 1545, and Rev. Rul. 80-282, 1980-2 C.B. 178, would pass muster in judicial review that took seriously the mandate of *New York Times v. Sullivan*, 376 U.S. 254 (1964), that debate on issues of public concern must be "uninhibited, robust, and wide-open." *Id.* at 270. See also *McDaniel v. Paty*, 435 U.S. 618, 640 (1978) (Brennan, J. concurring); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776-778 (1978); and *Widmar v. Vincent*, 454 U.S. 263 (1981); Caron and Dessingue, "I.R.C. § 501(c)(3): Practical and Constitutional Implications of 'Political' Activity Restrictions," 2 J. of L. and Politics 169 (1985) and literature cited *id.* at 180, n. 40, at 181, n. 41, and at 183 n. 54.

Not all of the amici have taken a position on the constitutionality of the restraints on religious organizations imposed in § 501(c)(3). All of the amici, however, have from time to time engaged in public communication of sincerely held religious convictions on matters of public concern. For example, amici and the representatives of a

host of other denominations and religious bodies are called upon regularly to express the views of religious groups on a wide variety of social and political issues with pressing ethical components. In testimony before the House Ways and Means Committee in 1972, Dr. J. Elliott Corbett of the United Methodist Church entered into the record of these hearings a policy declaration of his church which bespeaks the impossibility of any total severance of religion and politics in our society:

"We believe that churches have the right and the duty to speak and act corporately on those matters of public policy which involve basic moral or ethical issues and questions. Any concept of church-government relations which denies churches this role in the body politic strikes at the very core of the religious liberty. The attempt to influence the formation and execution of public policy at all levels of government is often the most effective means available to churches to keep before modern man the ideal of a society in which power [is] made to serve the ends of justice and freedom for all people." *Legislative Activity by Certain Types of Exempt Organizations*, Hearings Before the House Ways and Means Committee, 92d Cong., 2d Sess. at 303, 305 (1972).

In a similar vein a representative of the National Jewish Community Relations Advisory Council (NJCRAC) generally supported participation of religious organizations in legislative matters:

Each of the affiliates of the NJCRAC regards its program as an expression of the tenets of the Jewish faith which it is organized to advance. Their activities are inspired by the Prophets' mandate to pursue justice. They believe that mandate governs man's life in all its aspects and requires those who adhere to the principles of Judaism to let their views be heard in support of justice for all. . . . The members of these organizations have banded together because they are Jews and believe that they have a responsibility to

express a Jewish point of view. . . . Thus, their activity is a form of religious expression. *Id.* at 99.¹⁵

If this Court addresses the issue of the constitutionality of § 501(c)(3) at all, it should at the very least acknowledge that the permissibility of the restraints on free speech found in this statute of recent vintage is an open question, as applied to a protected religious organization engaging in dissemination of its religious message.

B. The massive scope of requested discovery threatens the autonomy of religious organizations.

The means selected by the plaintiffs to achieve their goal in this case includes sweeping discovery requests that threaten the integrity and autonomy of religious bodies. The standing issue is intimately connected with the threat to religious autonomy posed by the discovery requests, for a court without jurisdiction over the subject matter clearly lacks authority to enforce subpoenas for production of documents, whether the subpoenas are narrow or broad. Amici are particularly troubled that this case might turn into an inadvertent precedent damaging the autonomy of religious bodies. Hence amici urge this Court to focus particular attention on the intrusive character of the excessively broad discovery requests in this case, and on the potential chilling effect that granting such requests entails for similarly situated religious bodies.

¹⁵ See also Statement of the Baptist Joint Committee on Public Affairs, *id.* at 282; Statement of the United States Catholic Conference, *id.* at 307-312. See also Statement of the Baptist Joint Committee on Public Affairs, in *Influencing Legislation by Public Charities*, Hearing Before the House Ways and Means Committee, 94th Cong., 2d Sess. (1976); Statement of the Lutheran Council in the U.S.A., *id.* at 75-76; Statement on Behalf of the National Council of Churches of Christ in the U.S.A., *id.* at 81-82; and Statement of the United States Catholic Conference, *id.* at 90.

Even if the district court had jurisdiction over the subject matter because at least some of the plaintiffs have standing to sue the defendants, the district court nonetheless erred in ordering massive compulsory production of internal church documents to a private third party and extensive depositions of church officials and employees.¹⁶

In the view of amici, the plaintiffs' discovery requests are seriously intrusive upon the autonomy and integrity of religious bodies. In the process of attempting to prove their case on the merits, attorneys for the plaintiffs have proceeded against the petitioners with discovery requests that seek to examine in depth and in great detail virtually all significant relationships between Roman Catholic institutions at all levels and the entire political process. The subpoenas duces tecum addressed to the petitioners demand production of voluminous materials, including internal church discussions regarding the formulation and implementation of the Catholic Bishops' position on one of the most vexing and fundamental religious and political issues of our time, abortion.

If this Court sustains these subpoenas, the impact of this decision on the amici and similarly situated religious bodies could be staggering. There would be no principled way to differentiate between the plaintiffs in this case and opponents of another religious body suing the government to secure a judicial order revoking the tax-exempt status of that body the cause of its political involvement on any number of the other issues designated by the Catholic Bishops as "pro-life" matters (e.g., nuclear war, capital punishment, adequate health care, foreign

¹⁶ The subpoenas are described in the Petition for Certiorari, at 6-7, and more extensively in the Appellants' Brief before the court of appeals, at 9-12.

policy and immigration policies relating to Latin America or South Africa). Once such a plaintiff hostile to a church's moral teaching on any one of these themes had commenced an action like this case, the door would be wide open to dissipate the resources of a not-for-profit corporation dedicated exclusively to religious purposes. Congress surely never contemplated nor intended the result of costly litigation against religious bodies initiated by private third parties hostile to their moral teachings.

This Court, however, need not support the district court's order for such broad discovery against a non-party, for the plaintiffs' discovery rights are predicated upon the ground that its claims are not without merit. See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). Federal courts have denied discovery altogether where no proof of facts in support of a claim would entitle the party seeking discovery to relief. See, e.g., *Westminster Investing Corp. v. G.C. Murphy*, 434 F.2d 521 (D.C. Cir. 1970). Plaintiffs ground their cause of action: (a) on the view that as registered voters they have suffered a diminution of the strength of their franchise because of alleged governmental "subsidy" of the petitioners, and (b) on the view that as members of the clergy their religious convictions have been "denigrated" by an official policy of preferential treatment of the petitioners over other religious bodies who disagree with the petitioners on the issue of abortion. As was argued above, neither of these claimed bases for standing is significantly different from the bases unsuccessfully asserted by the plaintiffs in *Allen v. Wright*, 468 U.S. 737 (1984).

For these reasons, the legal predicate underlying the plaintiffs' discovery requests is seriously flawed, and their subpoenas should not be enforced.

C. The penalties imposed on the petitioners are excessive because certification is an equally effective alternative less restrictive of religious autonomy.

It is well settled that religious bodies are afforded additional constitutional protection precisely because of their religious character. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The freedom of religious bodies to address many vexing social problems from a religious perspective should not be conditioned upon their compliance with overbroad and intrusive discovery orders. Nor should religious bodies be subjected to excessive sanctions for seeking appellate review of the underlying power of the court to issue such orders, unless the government can demonstrate that it has utilized the least restrictive means of achieving a truly compelling governmental interest. *Hobbie v. Unemployment Appeals Commission*, 480 U.S. —, 107 S.Ct. 1046, 1049 (1987); *Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). The requirement of a less restrictive alternative announced in *Sherbert* is all the more appropriate in this case, involving the contempt power, which should be enforced by the smallest sanction needed to be effective, or "the least possible power adequate to the end proposed." *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821).

In this case, the district court plainly had an effective and less burdensome alternative readily available. All of the painful confrontation between the judiciary and a major religious body over the past two years could have been avoided by certifying the ruling on standing for purposes of interlocutory appeal under 28 U.S.C. § 1292(b). Where the delicate issue of religious freedom hangs in the balance, the refusal of the district court to certify his standing ruling, even after the plain teaching

of this Court in *Allen*, constitutes an abuse of discretion so significant that this Court should reverse the district court on this matter.

The permissibility of the contempt citation imposed upon the petitioners under the facts in this case and under free exercise standards is adequately preserved on this record, but this Court may likewise avoid a decision on this issue by focusing on the standing questions. In the event that this Court elects this path, amici urge this Court to make plain that the imposition of coercive fines of the magnitude in this case is a reserved question, and to refrain from any dicta that would serve to diminish the legitimate autonomy of religious bodies by expanding judicial power over these bodies where less restrictive alternatives (e.g., certification of the ruling on the standing of the plaintiffs for an interlocutory appeal) would serve any interest which may be asserted on behalf of orderly administration of justice and would obviate inquiry into whether the interest protected by the contempt order in this case was truly "compelling."

CONCLUSION

For the reasons set forth in this brief, amici curiae urge this court to reverse the judgment of the court of appeals denying standing to the church witness to seek appellate review of a contempt citation, accompanied by coercive fines, that were imposed because of the church's refusal to comply with intrusive discovery requests for sensitive internal records. Amici likewise urge this court to correct the error of the district court in *ARM I* that any of the plaintiffs have standing.

Respectfully submitted,

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APPENDIX

STATEMENT OF INTERESTS OF INDIVIDUAL AMICI

The National Council of Churches of Christ in the U.S.A. [NCC] is a community of thirty-one religious communions numbering over 40 million members. Some of these communions would agree with the views expressed by the petitioners concerning the morality of abortion; some of them would disagree. All of them have agreed, however—through their representatives on the Governing Board of the NCC—in support of religious bodies and all citizen groups to speak and to act on questions of public policy without suffering state-imposed penalties or disabilities. The Governing Board of the NCC has specifically recommended that its member communions not impair the relationships of confidence and trust within the religious community by disclosing to outsiders “the names of contributors, members, constituents . . . [or] personnel files, correspondence or other confidential and/or internal documents or information.” The NCC joins this brief in support of the right of a religious body to be free of governmental constraint to disclose such information to hostile outsiders.

The American Jewish Congress is a national organization of American Jews founded in 1918 to protect the civil, political, and religious rights of American Jews. It is exempt from taxation pursuant to I.R.C. § 501(c)(3). Although it was an early supporter of freedom of choice in abortion, and hence an opponent of the Roman Catholic position on abortion, it believes that the private respondents lack standing to challenge the church's tax-exempt status. To hold otherwise would expose tax-

exempt organizations to a campaign of intimidation by litigation.

James E. Andrews is the Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.), a national, Christian denomination with churches in all fifty states. It has approximately 3.1 million active members and approximately 11,700 congregations organized into 189 presbyteries and 20 synods. The General Assembly is the highest governing body of the church, meets annually, is composed of approximately 670 delegates known as commissioners, who are elected by the presbyteries. One-half of the commissioners are ordained clergy and the other half are ordained lay officers known as elders. This brief does not purport to reflect the views of all members of the church, but is based on policies decided by the General Assembly, or incorporated into the Constitution of the Presbyterian Church (U.S.A.) by vote of the presbyteries. The policies established by the General Assembly of the Presbyterian Church (U.S.A.) are not in agreement with the views of the petitioners with regard to matters of abortion rights and pro-life issues, but are in substantial agreement with the views on constitutional rights and religious liberty expressed in this brief.

The Baptist Joint Committee on Public Affairs [BJCPA] consists of representatives elected by each of eight cooperating Baptist conventions in the United States: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Con-

ference; and Southern Baptist Convention. These Baptist groups have nearly 30 million members and reflect the traditional Baptist concern for proper church-state relations. The BJCPA has as one of its mandates the obligation to respond "whenever Baptist principles are involved in, or are jeopardized through, governmental action." Among Baptists, the freedom of the church from entangling relationships with the government is a fundamental and sacred principle.

The Catholic League for Religious and Civil Rights [League] is a civil rights and anti-defamation organization, national in membership, dedicated to the defense of religious liberty and freedom of expression. Although the League does not purport to speak directly as the official voice of a religious body, this case raises substantial questions relating to central concerns of the League's members. When antagonists of a particular church invoke the power of the government to conduct far-reaching and intrusive examination of sensitive internal church documents, religious liberty suffers. When political opponents seek to penalize protected expressive activity crucial to effective church teaching on matters of public concern by maintaining costly and burdensome lawsuits, genuine freedom of expression is chilled and cannot flourish.

The Church of Jesus Christ of Latter-Day Saints [LDS Church] has an international membership in excess of 6 million members with general headquarters in Salt Lake City, Utah. There are in excess of 8,400 congregations in the United States. This brief does not purport to reflect the views of all members, but is based upon a policy decision made by the hierarchical general leader-

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ship of the Church, viz., The First Presidency and The Quorum of the Twelve Apostles. Members of these leadership organizations are regularly sustained in their positions by the general Church membership. The preservation of religious freedom is a fundamental tenet of the LDS Church. The LDS Church is particularly concerned with the threat to religious freedom posed by the massive discovery of sensitive church records ordered by the district court in this case.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the eighth largest Protestant body in the United States. It has approximately sixty-two thousand member congregations which, in turn, have approximately 2.6 million individual members.

The National Association of Evangelicals, located in Wheaton, Illinois, is a non-profit association of evangelical Christian organizations, including fifty thousand churches from seventy-eight denominations. It serves a constituency of 10 to 15 million people through its commissions and affiliates.

The Synagogue Council of America [SCA] is a coordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative, and Reformed. It is composed of: Central Conference of American Rabbis, representing the Reformed Rabbinate; Rabbinical Assembly, representing the Conservative Rabbinate; Rabbinical Council of America, representing the Orthodox Rabbinate; Union of American Hebrew Congregations, representing the Reformed Congregations; Union of Orthodox Jewish Congregations of

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America, representing the Orthodox Congregations; and United Synagogue of America, representing the Conservative Congregations. SCA takes no position on the merits of the underlying issue of abortion. It joins the brief solely to reverse the error of the lower courts on the questions of the standing of the petitioners and of the excessiveness of the penalty.

The present era of the Worldwide Church of God [WCG] was founded by the late Herbert W. Armstrong in 1933. Its doctrines and practices are based on a literal understanding of the Bible. WCG has approximately 330,000 members, co-workers, donors, and other adult affiliates. It has approximately 780 local congregations in 40 nations around the world, pastored by at least 1,400 ordained ministers. WCG is wary of detractors being vested with the power of the State to attack a church because dissident former members induced a court to appoint a receiver who took control of the administrative affairs of the WCG and all of its assets. At the time of hearing no evidence was introduced to support the inflammatory accusations in the complaint. Because WCG was the target of direct governmental interference with its autonomy and integrity, it is particularly sensitive to the threat to religious freedom posed by giving ideological opponents of religion free-wheeling access to the courts to pursue their agenda.

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No. 87-416

Supreme Court, U.S.

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE and
NATIONAL CONFERENCE OF CATHOLIC BISHOPS,

Petitioners,

—v.—

ABORTION RIGHTS MOBILIZATION, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, NEW YORK CIVIL LIBERTIES UNION,
NATIONAL ORGANIZATION FOR WOMEN, CATHOLICS FOR A
FREE CHOICE, AND NATIONAL EMERGENCY CIVIL LIBERTIES
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INTEREST OF AMICI^{1/}

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization with over 250,000 members. The New York Civil Liberties Union (NYCLU) is its statewide affiliate. The ACLU was founded in 1920 as an organization dedicated to the defense of individual rights. In pursuit of that goal, the ACLU frequently appears in federal courts throughout the country. The continued availability of the federal courts as a meaningful forum for constitutional litigation is a major institutional concern of the ACLU.

The National Organization for Women, Inc. (NOW), founded in 1966, is a national

^{1/} Letters of consent pursuant to Rule 36.2 have been filed with the Clerk of the Court.

membership organization of 160,000 women and men in over 750 chapters throughout the country. NOW has as one of its priorities the preservation of the right to reproductive freedom, including abortion, and believes that access to the courts is an important means of preserving that right.

Catholics For a Free Choice (CFFC) is a national educational organization established in 1973 that supports the right to legal reproductive health care, including family planning and abortion. As an organization of Catholics, CFFC supports policies of strict separation of church and state, based not only on the U.S. Constitution, but also on the Roman Catholic Declaration on Religious Liberty (Vatican II Dignitatis Humanae, 7 December 1965), which declares: " . . . the civil authority must see that the equality of

citizens before the law, which is itself an element of the common good of society, is never violated either openly or covertly for religious reasons and that there is no discrimination among its citizens."

The National Emergency Civil Liberties Committee (NECLC) is a not-for-profit organization dedicated to the preservation and extension of civil liberties and civil rights. Founded in 1951, it has brought numerous actions in the federal courts to vindicate constitutional rights. Through its educational work, it likewise has sought to preserve our liberties. From time to time, NECLC submits amicus curiae briefs to the courts when it believes issues of particular import for civil liberties are at stake.

The contention that respondents lack standing to bring the underlying lawsuit

against IRS is based, in amici's view, on an unduly narrow conception of federal jurisdiction under Article III. Amici are especially troubled by what we perceive as petitioners' attempt to expand the prudential limitations on Article III standing.^{2/} We believe that petitioners' position in this case reflects a basic misunderstanding of the relationship between the concept of standing and the notion of separation of powers.

The purpose of this brief is to explore that relationship. To avoid burdening the Court with repetitious argument, amici have only briefly addressed certain other aspects of the standing

^{2/} Unless otherwise indicated, the term "petitioners" is used throughout this brief to include the federal defendants who, although technically aligned as respondents, in fact support petitioners' standing argument.

inquiry. Amici nonetheless endorse the conclusion of both courts below that respondents' standing is adequately established by the allegations of their complaint.

SUMMARY OF ARGUMENT

In Allen v. Wright, 468 U.S. 737, 752 (1984), this Court observed that the requirement of standing is based on "the idea of separation of powers." The Allen Court also noted, however, that "the idea of separation of powers" finds expression in a variety of legal doctrines that are quite separate and distinct from the standing question. Id. at 750.

It is, therefore, wrong to assume that every concern about separation of powers automatically translates into a concern about standing. Yet petitioners

make precisely that error in their effort to raise prudential objections to respondents' standing in this case.

Resting on a very generalized statement of the separation of powers, petitioners argue that the provisions of the Internal Revenue Code should be enforced by IRS and not by the courts. No one quarrels with that statement, so long as IRS is complying with congressional guidelines. In this case, however, the allegation is that IRS is not complying with its congressional mandate. Under those circumstances, it has traditionally been the role of the courts to see that the laws are faithfully executed and that individuals who suffer the consequence of unlawful action are not left without remedy.

In similarly misguided fashion, petitioners assert that the federal courts should not take over the day-to-day operation of administrative agencies except in the most extraordinary circumstances. Again, that misstates what this case is about. Respondents have challenged an administrative decision to grant tax exempt status to the Catholic Church despite its alleged political activities. Proving that claim may involve substantial discovery. But if that discovery reveals a legal violation, the appropriate remedy hardly requires a judicial takeover of IRS. The fact that this is a "big" case does not, by itself, render it non-justiciable.

Petitioners also rely on the concept of prosecutorial discretion to suggest the inappropriateness of respondents' suit. The defense of prosecutorial discretion,

however, does not respond to the issue of standing. Moreover, respondents allege in their complaint that IRS has misapplied the law in a politically biased fashion. That assertion, which must be accepted as true at this stage of the proceedings, is sufficient to overcome a claim of prosecutorial discretion, even in a more traditional law enforcement context.

Finally, petitioners argue that respondents' complaint amounts to nothing more than a generalized grievance that should be addressed to the political branches. Although this Court has held that a mere generalized grievance does not confer standing, that concern is inapplicable on the facts of this case. First, the record as it now stands alleges more than a mere generalized grievance. Second, and more significantly, the

separation of powers principle that ordinarily channels political disputes into the political system cannot be rigidly enforced, through standing doctrine or otherwise, when the legal claim is that the political system has itself been skewed in favor of one side to the dispute, thereby diminishing the possibility of political redress.

ARGUMENT

ASSUMING RESPONDENTS MEET THE CONSTITUTIONAL REQUIREMENTS FOR ARTICLE III STANDING, THERE ARE NO PRUDENTIAL REASONS TO DISMISS THEIR COMPLAINT ON STANDING GROUNDS

Petitioners' effort to erect a prudential barrier to respondents' standing in this case rests on the misapplication of two undisputed principles. First, petitioners correctly assert that the standing doctrine articulated in this

Court's decisions "subsumes a blend of constitutional requirements and prudential considerations." Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982). Second, petitioners cite this Court's decision in Allen v. Wright, 468 U.S. 737, 752 (1984), for the proposition that "the law of Article III standing is built on . . . the idea of separation of powers."

The flaw in petitioners' logic lies in its conclusions rather than its premises. Specifically, the prudential aspect of petitioners' standing argument proceeds something like this: standing includes prudential considerations; standing also reflects separation of powers concerns; therefore, all separation of powers concerns can be incorporated into the

standing inquiry. It is a classic case of faulty reasoning, akin to arguing that elephants and humans are identical since both are mammals.

Allen v. Wright hardly supports such a strained result. To the contrary, Allen specifically notes that the requirement of standing is only one of a series of "doctrines that cluster about Article III," including "ripeness, political question, and the like." 468 U.S. at 750, quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178 (D.C.Cir. 1983) (Bork, J., concurring). All of these doctrines may share a common heritage to the extent that each represents an effort to reconcile the role of the judiciary in a representative government. Id. But each of these doctrines has also developed its unique own set of defining rules.

For example, the central inquiry in political questions cases is whether a legally-framed dispute has been textually committed to another branch of government and, if not, whether there are judicially manageable standards for resolving it. E.g., Baker v. Carr, 369 U.S. 186, 217 (1962). This issue may arise in a case that also raises standing problems. But it is obviously distinct from the question of whether the party seeking relief has alleged "a personal stake in the outcome of the controversy." Id. at 204. See also Flast v. Cohen, 392 U.S. 83, 100-01 (1968) (distinguishing between standing and the political question doctrine as separate aspects of Article III justiciability).

In one sense, of course, the proper relationship between the idea of separation of powers and the doctrine of standing was

expressly debated by this Court in Allen v. Wright. However, the majority's conclusion that the requirements of standing must be understood in light of the principle of separation of powers, 468 U.S. at 761-62 & n.26, falls far short of a holding that the two doctrines are functionally indistinguishable.

Writing for the Court in Allen, Justice O'Connor specifically recognized that the standing determination in any particular case must be rooted in the allegations of the complaint. In Allen itself, the Court concluded that the generalized grievance stated in plaintiffs' complaint either could not be remedied by the judicial branch or, alternatively, could only be remedied by "a restructuring of the apparatus established by the

Executive Branch to fulfill its legal duties." 468 U.S. at 761.

Upon those distinctive facts, the Allen Court held that standing could not be conferred without violating the principle of separation of powers inherent in Article III.^{3/} Allen does not hold that every objection to a complaint that can be framed in separation of powers terms is, ipso facto, relevant to the standing inquiry.

^{3/} The basis for the Court's conclusion in Allen is somewhat ambiguous. Under well-settled law, the three criteria for constitutional standing are personal injury, causation, and redressability. See Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976). In Allen, the Court expressed concern about all three elements. The Court also expressed concern about the intrusiveness of any judicial remedy. However, as various commentators have noted, the requested relief would have been just as intrusive even if causation were clearly established. E.g., Nichol, "Abusing Standing: A Comment on Allen v. Wright," 133 U.Pa.L.Rev. 635, 646 (1985). Thus, it is not entirely clear what the Court meant when it said that the scope of the remedy is relevant to the determination of causation.

The danger of that approach, which petitioners at least implicitly advocate in this case, is that it "obscure[s]" the multifaceted nature of the justiciability question under Article III. See Tushnet, "The Sociology of Article III: A Response to Professor Brilmayer," 93 Harv.L.Rev. 1698, 1726 (1980). In so doing, it undermines the principle of separated powers that it purports to promote by increasing the likelihood that the federal courts will, through a process of unexamined erosion, forfeit their role in protecting individual rights against official overreaching. See generally, Tribe, American Constitutional Law §3-14 (1988).

A. The Relief Requested By Respondents In This Case Does Not Unduly Intrude On Executive Authority To Enforce The Law

Relying on Allen v. Wright, petitioners contend that the complaint in this case should be dismissed on standing grounds. According to petitioners, the relief requested by respondents violates the principle of separation of powers because, if granted, it would require IRS to "restructure" its enforcement apparatus under §501(c)(3) of the Internal Revenue Code, 26 U.S.C. §501(c)(3).

As demonstrated below, petitioners' characterization of the lawsuit is factually inaccurate. See pp.22-24, infra. Legally, petitioners' separation of powers argument, even assuming it is relevant to the standing inquiry, vastly overstates the applicable law.

Public officials are frequently directed to "restructure" their activities if necessary to conform to statutory or constitutional requirements. Our system of government demands no less. In the famous words of Chief Justice Marshall: "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

Moreover, there are numerous instances in which this Court has insisted on a dramatic "restructuring" of government programs in order to secure compliance with the law. School desegregation, see Brown v. Board of Education, 347 U.S. 483 (1954), and redistricting, see Reynolds v. Sims,

377 U.S. 533 (1964), are only two examples of this phenomenon.^{4/}

It is simply impossible, therefore, to read Allen v. Wright as holding that standing must be denied whenever the requested relief would require the government to "restructure" its activities. And indeed, the Court expressly noted in Allen that it did not accept "the more general proposition that no consequence of the allocation of administrative enforcement resources is judicially cognizable." 468 U.S. at 761 n.26.

^{4/} As Justice Stevens observed in his dissenting opinion in Allen v. Wright, 468 U.S. at 792 n.10: "[S]tanding doctrine has never stood as a barrier to such 'restructuring.'" Admittedly, neither Brown nor Reynolds involved the "restructuring" of a federal program. However, the Allen majority did not rely on this federal-state distinction in its discussion of separation of powers. See 468 U.S. at 760.

The line between judicial abdication and judicial usurpation is not easy to find amidst these conflicting signposts. Recognizing this dilemma, Allen largely abandons the search for a universal formula to determine standing.^{5/} Thus, even under Allen, petitioners' repeated and quite generalized insistence on the need to preserve administrative independence is not particularly helpful. Rather, Allen emphasizes, "the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the

^{5/} "We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it, nor when we say that this very fact is probably proof that the concept cannot be reduced to a one-sentence or one-paragraph definition." Valley Forge, 454 U.S. at 475.

particular claims asserted." 468 U.S. at 752.

In short, it is critical to look at the facts. For obvious reasons, petitioners take a far less detailed approach. Minimizing any differences between Allen and this case, petitioners stress that both cases involved a challenge to the tax enforcement policies of IRS. Thus, petitioners argue, if the requested relief in Allen was too intrusive to permit standing, the result in this case must be the same. The two cases, however, are easily distinguishable, even when measured on the uncertain scale of judicial intrusiveness.

Plaintiffs in Allen brought a nationwide class action alleging that IRS was failing to enforce its own regulations denying tax exempt status to racially

segregated private schools. Plaintiffs further alleged that the existence of these white academies frustrated efforts to desegregate the public schools that plaintiffs' children attended. The class definition reflected this broad legal theory. It embraced several million black children living in school districts that were, or someday might be, subject to judicial desegregation orders. 468 U.S. at 743.

The scope of the relief corresponded to the scope of the class in Allen. Thus, plaintiffs' complaint was not directed at specific schools, although specific schools were named in the complaint as illustrative of the problem. Id. at 744. Rather, plaintiffs sought an injunction compelling IRS to develop and implement procedures for identifying racially discriminatory schools

anywhere in the country that were improperly receiving the benefits of tax exemption.

This Court clearly believed that supervision of that decree would have required a significant degree of judicial monitoring. As the Court noted:

[Plaintiffs'] complaint, which aims at nationwide relief and does not challenge particular identified unlawful IRS actions, alleges no connection between the asserted desegregation injury and the challenged IRS conduct sufficient to overcome the substantial separation of powers barriers to a suit seeking an injunction to reform administrative procedures.

468 U.S. at 766. See also Rizzo v. Goode, 423 U.S. 362 (1976).

The complaint in this case is substantially different. Unlike Allen, its challenge is limited to "particular identified unlawful IRS action." Moreover, a judicial order requiring IRS to rescind the tax

exempt status of the Catholic Church so long as it engages in political activity would not require the sort of intrusive supervision that troubled the Allen Court. Indeed, the prohibitory injunction plaintiffs seek here would be relatively straightforward, assuming the allegations in their complaint could be proved.

In an effort to create a closer fit between this case and Allen, petitioners have noted that there are thousands of local parishes and schools that receive the benefit of the Church's tax exempt status and that the activities of each of these entities are subject to examination if the lawsuit goes forward.

While that may be true for discovery purposes, it is not relevant to the remedial issue that petitioners have raised. IRS has granted the Catholic

Church a single, "umbrella" tax exemption.^{6/} If that exemption is inappropriate because the Church or its constituent entities has engaged in prohibited political activity, only one tax exemption need be revoked. Unlike Allen, there is no need to develop new procedures that will then have to be applied to numerous other, unknown organizations. Nor is there any problem in identifying the alleged violator.

In short, plaintiffs neither seek nor require "an injunction to reform administrative procedures." Allen, 468 U.S. at 766. What they seek is an order directing IRS to enforce the law in one specific instance. The role of the courts

^{6/} Gov't Brief at 2, n.1. The letter conferring this tax exemption is reprinted in the Joint Appendix at 24-27.

in determining the propriety of that order is no more intrusive than the role the courts played when an analogous order was challenged by the taxpayer in Bob Jones University v. United States, 461 U.S. 574 (1983).

B. The Concept of Prosecutorial Discretion Does Not Bar Relief In This Case

Petitioners' second prudential attack on respondents' standing in this case rests on a claim of prosecutorial discretion. In petitioners' view, the decision whether to enforce the provisions of the tax code against the Catholic Church is one for IRS officials alone and cannot be dictated by the courts.

In support of that proposition, petitioners rely on the following passage from Heckler v. Chaney, 470 U.S. 821, 831-32 (1985):

[A]n agency decision not to enforce [the law] often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Chaney, of course, was not a standing case. It was a case construing the "committed to agency discretion" language of the Administrative Procedure Act, 5 U.S.C. §701(a)(2). Although petitioners minimize the importance of this distinction, it is in fact significant.

As the Chaney factors illustrate, the reviewability of prosecutorial decisions does not generally turn on the identity or stake of the person mounting the challenge. Indeed, most often the claim of prosecutorial abuse is raised by the alleged victim of the abuse, whose stake in the controversy cannot be disputed. Rather, the rationale for insulating enforcement decisions from judicial review is the lack of judicially manageable standards.

The rule of non-reviewability, however, is not absolute. Its limits were summarized by this Court in Wayte v. United States, 470 U.S. 598, 608 (1985) (citations omitted):

[A]lthough prosecutorial discretion is broad, it is not "'unfettered.' Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints." In particular, the decision to prosecute may not be "'deliberately based upon an unjustifiable

standard such as race, religion, or other arbitrary classification," including the exercise of protected statutory or constitutional rights.

In this case, respondents allege that the failure of IRS to revoke the tax exempt status of the Catholic Church reflects a conscious decision by government officials, whose subsidizing impact effectively supports the political agenda of those groups and individuals opposed to the constitutional holding of Roe v. Wade, 410 U.S. 113 (1973).

Accepting those allegations as true, Warth v. Seldin, 422 U.S. 490, 501 (1975), the government's unwillingness to enforce the provisions of the Internal Revenue Code in an evenhanded manner exceeds the permissible limits of prosecutorial discretion. That is so, moreover, precisely because the First Amendment requirement of

content-neutrality creates the judicially manageable standard lacking in most challenges to the exercise of prosecutorial discretion.

This Court has repeatedly held that the government's tax subsidies may not be "aimed at the suppression of dangerous ideas." Cammarano v. United States, 358 U.S. 498, 513 (1959); Speiser v. Randall, 357 U.S. 513, 519 (1958). Applying that principle in Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983), this Court upheld a statutory exemption that permitted lobbying by the Veterans for Foreign Wars, but not by other tax exempt organizations, upon "find[ing] no indication that the statute was intended to suppress any ideas or any demonstration that it had that effect."

The record in this case does not permit a similarly benign finding. Whatever prudential concerns are embodied in the notion of prosecutorial discretion, therefore, do not apply here.

C. Respondents Should Not Be Required To Seek Relief From The Political Process When The Essence Of Their Claim Is That The Political Process Has Been Skewed In Favor Of Their Political Opponents

Petitioners' final and most substantial objection to respondents' standing rests on the prudential doctrine that federal courts should not adjudicate generalized grievances that are more properly addressed to the political branches. That doctrine, however, is inapplicable to this case for two reasons.

First, respondents' complaint alleges more than a mere generalized grievance, as the district court properly understood.

Second, the complaint in this case alleges a defect in the political process itself. For at least fifty years, this Court has recognized that the federal courts have an important role to play under these circumstances -- not in dictating the outcome of the political debate but in assuring that the debate proceeds according to fair rules.

Respondents seek nothing more from this lawsuit. Thus, it is true, as petitioners note, that respondents have not identified any candidates that have been defeated or any legislative battles that have been lost as a result of the tax exempt status conferred on the Catholic Church. But petitioners are wrong in arguing that the absence of these allegations demonstrates the lack of any injury-in-fact.

The injury-in-fact that respondents have suffered, assuming once again that the allegations of their complaint are accepted as true, is the necessity of fighting their political battle on an uneven playing field.^{17/} In conceptual terms, it is no different than a direct federal subsidy limited to anti-abortion candidates. Clearly, such a subsidy would be vulnerable to equal protection attack even if its challengers could not conclusively establish that any specific election was lost as the result of the government's improper bias.

For similar reasons, petitioners' causation argument is flawed. According to petitioners, the election or defeat of any

^{17/} This brief does not address the separate issue of clergy standing, which respondents have also alleged.

candidate (even assuming that abortion was a major campaign issue), is the result of myriad decisions by individual voters that cannot be traced to any particular cause. That argument, however, proves too much. If accepted, it would mean that even a losing candidate could not challenge a campaign finance plan that was openly based on ideological concerns.

Here, as in Baker v. Carr, 369 U.S. 186, 208 (1962) (citations omitted),

[respondents] are asserting "a plain, direct and adequate interest in maintaining the effectiveness of their votes," not merely a claim of "the right, possessed by every citizen, to require that the Government be administered according to law."

Petitioners attempt to distinguish Baker on the grounds that this is not an election case. The distinction is unpersuasive, however. In Baker and the reapportionment cases that followed, the

essential claim was that plaintiffs' vote was being diluted by malapportionment. Here, the essential claim is that respondents' vote is being diluted because the opposing side in the abortion debate has been granted a federal subsidy to seek electoral support. The result in each instance is an unfair distortion of the electoral system that can and should be remedied by the federal courts.

Using the language of separation of powers, petitioners' contend that any claim of political bias in the §501(c)(3) program must be addressed to the political branches and not to the judiciary. In fact, that argument undermines the very system of checks and balances that the separation of powers was meant to preserve.

As Professor Ely has written, the role of the courts in our constitutional system

may be analogized to the role of a referee, who "intervene[s] only when one team is gaining an unfair advantage, not because the 'wrong' team has scored." Ely, Democracy and Distrust 103 (1980). In United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938), this Court made a similar point when it recognized, in now classic fashion, the indispensable role of the federal courts in ensuring the fairness and inclusiveness of "those political processes that can ordinarily be expected to bring about [relief]" ^{8/}

^{8/} Respondents' describe this as a case of alleged "competitor" standing. By failing to distinguish between economic and political competition, however, that description does not appreciably advance the analysis. At least since Carolene Products, the fairness of political competition has been recognized as an appropriate concern of the judiciary. By contrast, the fairness of economic competition is generally a matter for legislative determination.

This case involves precisely the situation envisioned by Carolene Products. Respondents are not complaining about the results of the political process but about the "unfair advantage" given their political opponents. They are entitled to have that claim heard and decided in federal court.

CONCLUSION

For the reasons stated herein, this Court should uphold respondents' standing to bring the underlying lawsuit, assuming that question is reached in this case.

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No. 87-416

Supreme Court, U.S.

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In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE et al.

Petitioners,

v.

ABORTION RIGHTS MOBILIZATION, INC. et al.

Respondents

On Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

BRIEF AMICUS CURIAE OF
NATIONAL ASSOCIATION OF LAITY
SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Do respondents have standing as voters and clergy members to challenge the government's unconstitutional and unlawful enforcement of a provision of the Internal Revenue Code?

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CONSTITUTIONAL PROVISIONS

U.S. Const., Article III, Section 2:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- . . .
Controversies to which the United States shall be a Party; . . ."

U.S. Const., Amend. I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;"

INTEREST OF AMICUS CURIAE

The National Association of Laity ("NAL") is to support the constitution and decrees of the Second Vatican Council. New Catholic Encyclopedia, Volume XVII (New York 1979), at p. 446. It is concerned with the improper entangling of Catholic institutional governments with the civil structure of the American government. NAL has taken positions on moral issues relating to Catholic theology

and intends to take positions in the future. The positions taken by NAL have in the past and will likely in the future be positions differing from the institutional church as represented by petitioners.

NAL opposes the trend of the hierarchy to use money and other resources of the church to pursue a political agenda. See Lader, "Power, Politics and the Church", Conscience, Volume VII, nos. 5 and 6 (September-December, 1987), at page 38. See also, letter of Senator Patrick J. Leahey, to the editors, Conscience, Vol. VIII, No. 4 (July-August, 1987), at page 12.

NAL does not currently enjoy the benefits of having contributions to it treated as deductible by its contributors, for federal income tax purposes, pursuant to Title 26 U.S.C., Section 501(c)(3). NAL is therefor at

an economic disadvantage in propagating its positions in comparison with petitioners.

INTRODUCTION

NAL supports respondents' position with respect to question 2. It contends that voters and clergy members have standing in challenging the government's unconstitutional and unlawful enforcement of a provision of the Internal Revenue Code, granting tax-exempt status only to organizations which do not participate in political campaigns on behalf of any candidates for public office.

STATEMENT OF THE CASE

This matter comes before the court on a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the decision of that court on an appeal from an adjudication of civil contempt against petitioners, who are non-party witnesses in the United States District Court for the Southern District of New York.

The Court of Appeals affirmed (2-1) the adjudication of contempt by the district court, holding (1) that petitioners could challenge their contempt adjudication only upon the limited ground that the district court lacked even colorable jurisdiction over the underlying lawsuit and (2) that colorable jurisdiction existed with the result that petitioners challenge failed.

The Court of Appeals did not need to

reach, and did not reach, the question as presented.

The district court recognized respondents' claim of direct personal injury from the fact that the federal government's failure to enforce political action limitations of Section 501(c)(3), has placed the petitioners at a competitive disadvantage with the institutional church in the arena of public advocacy on important public issues.

Plaintiffs in the district court included clergy members of religious institutions and denominations that do not share the theological positions of the institutional Catholic Church. Plaintiffs also included voters who assert that the political process is distorted by subsidy of political activity by the Catholic Church, but not others, including themselves.

Defendants were the Secretary of the Treasury and the Commissioner of Internal Revenue.

Petitioners, who were not parties in the district court, are the National Conference of Catholic Bishops ("NCCB"), an assembly of all bishops of all rites of the Catholic Church in the United States, its possessions and territories, and the United States Catholic Conference, the administrative arm of NCCB.

ARGUMENT

1. Respondents have standing as voters and clergy members to challenge the government's unconstitutional and unlawful enforcement of a provision of the Internal Revenue Code.

Standing requires plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the request for relief." Allen v. Wright, 468 U.S. 737, 751 (1984). In addition, the plaintiff must satisfy the so-called "prudential concerns", reflecting "judicially self-imposed limits in the exercise of federal jurisdiction". Id.

NAL adopts and relies upon the brief of respondents Abortion Rights Mobilization et al., with respect to the analysis of injury to respondent and the likelihood that their request for relief will be redressed.

Prudential concerns favor standing for respondents.

The Establishment Clause arose out of a desire to prohibit a national or state church such as had existed in England, other countries and some of the colonies. The First Amendment "rests upon the premise that both religion and government can best work to achieve their ~~lefty~~ aims if each is left free from the other within its respective sphere." McCullum v. Board of Education, 333 U.S. 203 (1948).

The object of insuring governmental neutrality toward religious viewpoints cannot be left exclusively to the executive branch of government in a matter so fundamental as tax exemption.

Favoritism and perceived favoritism will result where powerful, organized churches or ecclesiastical bureaucracies, plead for and

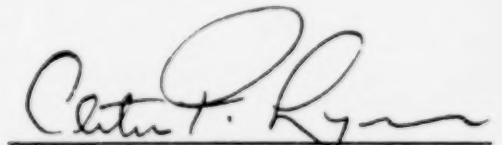
obtain tax rulings through administrative processes without means of judicial review at the instance of religious dissenters and non-religious voters.

The executive branch, reliant upon not giving offense to ecclesiastical pressure groups in order to be re-elected, may yield to demands for special treatment or overlook non-compliance with the prohibition on electioneering contained in Section 501, particularly where such electioneering may be in favor of the office holder.

Equity in the market-place of ideas can be achieved only if those with an interest in promoting equity are accorded a forum and standing in it.

CONCLUSION

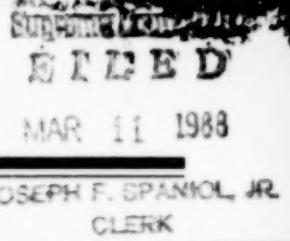
WHEREFORE, if the court reaches question 2, the court should affirm the court of appeals on the ground that plaintiffs have standing.



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In The
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v.

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE

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for Religious Liberty, The Center for Constitutional
Rights, The Center for Law and Social Policy, The Northwest
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INTERESTS OF AMICI CURIAE

The National Abortion Rights Action League ("NARAL") is a national organization with more than 100,000 members, in both 34 state affiliates and the national organization, which engages in community organizing, leadership development, and lobbying of state and federal legislatures on abortion rights and issues of reproductive self-determination. NARAL is exempt from federal income tax under § 501(c)(4) of the Internal Revenue Code¹; it is not eligible to receive tax deductible contributions.

Because corporations may not contribute to federal election campaigns,² NARAL has established a "separate segregated fund,"³ called NARAL-PAC, which engages in partisan political activity and raises funds from NARAL members to contribute to the campaigns of pro-

¹ 26 U.S.C. § 501(c)(4) (1982).

² 2 U.S.C. § 441b (1982).

³ 2 U.S.C. § 441b(b)(2)(C) and 11 C.F.R. § 114.5.

choice political candidates.

In addition, in order to raise tax-deductible charitable contributions, NARAL has established the NARAL Foundation, a non-profit organization which engages in public education on reproductive health policy, and specifically on the importance to women of safe, legal, and accessible abortion services. The Foundation is exempt from federal income tax under § 501(c)(3) of the Internal Revenue Code.⁴

This tripartite structure is prompted by the federal tax laws governing non-profit public education and advocacy organizations,⁵ as well as federal election laws.⁶ Read together, these laws do not permit NARAL to undertake such a wide range of advocacy and electoral activities within the framework of a single § 501(c)(3) or § 501(c)(4) organiza-

⁴ 26 U.S.C. § 501(c)(3) (1982).

⁵ Id.

⁶ 2 U.S.C. § 431-434 (1982).

tion.⁷

Many of NARAL's members are registered voters who actively participate in the political and electoral process. Many of these individuals support pro-choice candidates for elective office by making financial contributions to NARAL-PAC.

Nonetheless, NARAL's pool of donors is generally more likely to contribute to NARAL Foundation than to NARAL-PAC, for several reasons. First, because NARAL Foundation is exempt under § 501(c)(3), contributions to the Foundation to carry out its educational programs may be deducted from federal income taxes.⁸ Contributions to NARAL-PAC, by

⁷ Section 501(c)(3) organizations must, as a condition of their preferred tax status (i.e., eligibility to receive tax deductible contributions), refrain from any participation or intervention in political campaigns on behalf of or in opposition to candidates for elective office. This prohibition extends to the publication and distribution of "voters guides" to candidates for elective office where the guides evidence a bias on certain issues. See Rev. Rul. 78-248, 1978-1 C.B. 154.

⁸ 26 U.S.C. § 170 (1983).

contrast, are not entitled to such deductions. Second, because a woman's right to abortion is a controversial issue, many donors prefer that their gifts to NARAL not be publicly known. As a general matter, anonymity is not possible for donors to NARAL-PAC, since the names of substantial contributors must be disclosed to the Federal Election Commission.⁹

NARAL's particular interest in the issues before this Court arise from the first-hand experience of its members and supporters as pro-choice electoral activists, and the injuries they have sustained as a result of the seemingly unchecked ability of anti-abortion organizations, including the petitioners in this case, to finance their anti-abortion electoral activities with tax deductible dollars. These violations have injured NARAL in a manner similar to that described in respondents' Amended Complaint, by diminishing NARAL's relative ability to

influence the electoral process.

The following organizations, some of which are tax-exempt under § 501(c)(3) and under § 501(c)(4), share the concern that respondents and other individual pro-choice activists have standing to redress injuries to them caused by IRS failure to enforce provisions of the Internal Revenue Code against petitioners.

The AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, a national organization of over 150,000 women and men, is strongly committed to achieving legal, social, and economic equity for women. AAUW and the AAUW Education Foundation and Legal Advocacy Fund support basic constitutional rights for all persons, including First Amendment rights, separation of church and state, the right to privacy, and equal protection under the law. The individual's right to make her own reproductive choices continues to be a priority public policy issue for AAUW.

⁹ 2 U.S.C. § 434 (1982).

AMERICANS FOR RELIGIOUS LIBERTY is a non-profit, national educational organization dedicated to defending religious freedom, freedom of conscience, and the constitutional principle of separation of church and state.

The CENTER FOR CONSTITUTIONAL RIGHTS is a non-profit legal and educational corporation founded in 1966. It is dedicated to advancing and protecting the rights and liberties protected by the Bill of Rights. CCR was one of the first legal organizations to become involved in the issue of defending reproductive rights for women.

The CENTER FOR LAW AND SOCIAL POLICY is a public interest law firm which provides representation to women, minorities, the disabled and the poor on issues of family law and policy. To preserve equal access to justice, it is essential to protect the right of private citizens to challenge illegal

government activity, whether such activity occurs through government action or failure to act.

The NORTHWEST WOMEN'S LAW CENTER is a private non-profit organization in Seattle, Washington, that works to advance the legal rights of women by means of litigation, education, and providing information and referrals. Protecting women's freedom of reproductive choice is one of the Law Center's priority issue areas. The Law Center has participated in several cases involving reproductive rights before the U.S. Supreme Court.

The UNITED CHURCH OF CHRIST, OFFICE FOR CHURCH IN SOCIETY, believes that the Catholic Church has not respected the non-electioneering restrictions governing § 501(c)(3) charities, that the Internal Revenue Service has consistently failed to enforce those restrictions fairly, and that such unfair enforcement policies injure churches and other tax-exempt

advocacy groups like the UCC which do abide by the non-electioneering conditions of their tax-exempt status.

The UNITED STATES STUDENT ASSOCIATION is a national membership organization representing college and university students from around the nation. USSA advocates at the federal level for student concerns on campuses. As a small budget, § 501(c)(4) organization, USSA is concerned that large, wealthy but non-profit organizations continue to receive tax benefits from the federal government at the same time that they participate in politics and the political process. It is for this reason that USSA supports petitioners in this case.

The WOMEN'S EQUITY ACTION LEAGUE is a national non-profit membership organization specializing in economic issues affecting women and sponsoring research, education projects, litigation and legislative advocacy. As a §

501(c)(3) organization, WEAL is concerned that selective enforcement of this provision allows certain donors to obtain a discount on participation in democracy. Selective enforcement disadvantages both other non-profit organizations as well as their donors.

The WOMEN'S LAW PROJECT is a non-profit feminist law firm dedicated to advancing the status and opportunities of women through public education, litigation, advocacy and research. The WLP has played a leading role in defending reproductive rights in the courts, including representing plaintiff women and medical providers in Thornburgh v. ACOG, 476 U.S. 747 (1986).

The WOMEN'S LEGAL DEFENSE FUND is a § 501(c)(3) tax-exempt non-profit membership organization founded in 1971 to challenge sex-based discrimination and to advance women's concerns through the legal system. WLDF has worked extensively on issues of reproductive freedom.

STATEMENT OF THE CASE

Respondents, plaintiffs below, are Abortion Rights Mobilization, Inc. ("ARM") and other groups and individuals who advocate the belief that abortion of a pregnancy should be a safe and legal option for women. J.A. 6-9. The underlying action was brought by respondents against the Internal Revenue Service (IRS), to challenge IRS' failure to enforce § 501(c)(3)'s prohibition against partisan political activity, which has injured respondents' constitutional rights. J.A. 17-8.

The petitioners herein are not now parties to the underlying action. They are the two principal national organizations of the Catholic Church in the United States, the United States Catholic Conference and the National Conference of Catholic Bishops. J.A. 9. Petitioners are exempt from federal income tax under § 501(c)(3) of the Internal Revenue Code. J.A. 9. Although the petitioners have been dismissed as parties to the underlying action, they remain involved in this lawsuit

due to discovery orders and contempt orders issued against them by the District Court.

J.A. 4.

In their Amended Complaint, respondents claimed that certain organs of the Catholic Church have flagrantly engaged in partisan political campaign activities in violation of their § 501(c)(3) status, and that the IRS has failed to enforce against petitioners the laws prohibiting such activity. J.A. 9-14.¹⁰

¹⁰ For example, in 1975, petitioners adopted a "Pastoral Plan for Pro-life Activities," which was, in effect, a blue-print for a national anti-abortion campaign. One of the methods described in this Plan to achieve this goal was the creation of "congressional district pro-life action group[s]" whose objectives, inter alia, were:

"(8) To elect members of their own group of active sympathizers to specific posts in all local party organizations.

* * *

(10) To maintain an informational file on the pro-life position of every elected official and potential candidate.

(11) To work for qualified candidates who will vote for a constitutional amendment and other pro-life issues. . . ."

J.A. 12. Since petitioners have moved to dismiss respondents' Amended Complaint, this

Respondents' Amended Complaint also set forth the particularized nature of the injuries suffered by the various classes of respondents as a result of IRS' inaction. Respondents sought an order from the district court requiring the IRS to determine whether petitioners had violated § 501(c)(3) and, if so, to take such action as is required by the statute -- namely, revocation of petitioners' § 501(c)(3) status.

There are two issues now before this Court. First, whether petitioners, as non-party witnesses to a civil suit, have standing to challenge the district court's discovery order by challenging the court's jurisdiction over the underlying case, and second, whether the district court and the U.S. Court of Appeals for the Second Circuit correctly found that respondents had standing to bring this

Court must accept as true, and to construe most favorably to the respondents, those factual allegations contained in the Amended Complaint. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109 n.22, 112 (1979); *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

action.

Amici curiae fully support respondents' arguments that there is no legal basis for the nonparty petitioners to challenge the district court's jurisdiction over this case, and that ARM and respondent clergy have standing to bring the underlying lawsuit. In this brief, however, amici curiae focus solely on the issue whether electoral activists or members of ARM and the other respondent organizations also have standing to bring this action.

SUMMARY OF ARGUMENT

Respondents in this case are able to satisfy each of the elements of the case and controversy requirements of Article III of the U.S. Constitution. Respondents are 'pro-choice electoral activists' who have suffered particularized injuries to their interests as voters, campaign workers, contributors and candidates, as a result of the unfair advantage obtained by petitioners' use of tax-deductible dollars to finance their anti-abortion electioneering activities.

Respondents' First Amendment rights to a fair electoral process are directly harmed by the IRS' toleration of the de facto subsidization of the anti-abortion electioneering of petitioners. This can be redressed by a district court order directing the IRS to utilize its existing authority to determine whether petitioners have violated § 501(c)-(3)'s prohibition against partisan political activity and, if so, to strip them of their § 501(c)(3) status. Accordingly, respondents

satisfy the Article III requirements of causation and redressability.

This Court has noted the importance of certain 'prudential' concerns to determinations of standing. In the present case, these concerns weigh in favor of respondents' standing. Congress has spoken in favor of vigorous enforcement of § 501(c)(3), and has provided the IRS with new authority to halt abusive political activity by tax exempt organizations -- precisely the relief sought by respondents herein.

Moreover, this Court's sensitivity to separation of powers concerns should counsel in favor of standing in this case. Respondents do not seek any extraordinary equitable relief which would entangle the courts in ongoing monitoring of the IRS. Rather, respondents seek only to have the court direct the IRS to do what is already required by the Internal Revenue Code, namely, to enforce fairly § 501(c)(3)'s prohibition against partisan political activity.

Recognizing respondents' standing will not, of itself, harm petitioners' interests in religious freedom. To the extent that these important First Amendment concerns will need to be addressed on the merits, this is precisely the delicate balancing most appropriate for the courts. The IRS is well-equipped to perform the delicate task of investigating petitioners' alleged tax status violations with due concern for church-state issues, and has been provided statutory tools expressly designed for such sensitive inquiries.

ARGUMENT

- I. THROUGH ITS ADMINISTRATION OF THE TAX LAWS GOVERNING CHARITABLE ORGANIZATIONS AND CHARITABLE DEDUCTIONS, IRS ACTIONS IMPLICATE CRITICALLY IMPORTANT CONSTITUTIONALLY PROTECTED RIGHTS, AND THOSE WHOSE CONSTITUTIONAL RIGHTS ARE INJURED BY ITS ACTIONS MUST HAVE STANDING TO SUE.

Respondents have standing to challenge IRS's treatment of petitioners under the tests set forth by this Court in Allen v. Wright, 468 U.S. 737 (1984). Under Allen, a plaintiff must have personally suffered a concrete, particularized injury that is fairly traceable to the challenged conduct and that is redressable by the requested relief. Id. at 751. Respondents' injury to their First Amendment rights as "electoral activists" clearly satisfies this case and controversy requirement of Article III.

A. Respondents Who Are Pro-Choice Electoral Activists Have Suffered Injury-in-Fact to Their First Amendment Rights.

Pro-choice respondents who are politically active as candidates, campaign workers

and campaign contributors¹¹ have suffered an injury-in-fact to their right to participate in a fair electoral process.¹² This injury arises out of the IRS' failure to halt petitioners' use of tax-deductible dollars to engage in anti-abortion electioneering, in violation of § 501(c)(3) of the Internal Revenue Code. Pro-choice electoral activists are distinctly injured, since they do not use tax-deductible dollars to finance their electoral participation,¹³ while their

¹¹ These are the respondents who are described in Paragraph 10 of ARM's Amended Complaint. J.A. 9.

¹² This Court has expressly recognized that the first amendment values the process of politics not just its object. See Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 186 (1979). Thus, it is not necessary for respondents to demonstrate that IRS' inaction has affected the outcome of any specific election or campaign, since the injury to pro-choice electoral activists relates to the fairness of the election process, rather than the election result.

¹³ Although the effect of deductibility on donations has not been quantified, fund-raisers universally recognize its pivotal importance. See, e.g., Taxation with Representation of Washington v. Regan, 676 F.2d 715, 722 (1982), rev'd on other grounds, 461

political opponents do just that. As a result, the IRS has countenanced a tax subsidy for petitioners' anti-abortion electioneering that is not available to respondent pro-choice electoral activists, thereby unfairly affecting the electoral balance and violating respondents' rights under the First Amendment.

It is well established that "granting financial benefits to some interests may be under some circumstances the same as restricting the First Amendment rights of others."

U.S. 540 (1983), citing Bob Jones University v. Simon, 416 U.S. 725, 729-30 (1974) ("[A]ppearance on the Cumulative List is a prerequisite to successful fundraising for most charitable organizations. Many contributors simply will not make donations to an organization that does not appear on the Cumulative List.").

Scholars generally agree that tax incentives are certainly a motivating factor underlying the large amounts that are being contributed to charitable organizations: "The sum of these contributions to public charities is impressive, and was estimated almost ten years ago at \$26 billion a year. Contributors are moved to such generosity, in part, by the fact that they may deduct their donations from their personal income taxes." Houck, With Charity For All, 93 Yale L.J. 1415, 1428 (1984).

Common Cause v. Bolger, 574 F. Supp. 672, 680 (D.D.C. 1982), aff'd, 461 U.S. 911 (1983) (citations omitted). Both tax exemptions and tax-deductibility are forms of government subsidy administered through the tax system. As this Court recognized in Regan v. Taxation With Representation of Washington, 461 U.S. 540, 544 (1983), "[a] tax exemption has much the same effect as a cash grant to the organization"14

The IRS' inaction constitutes de facto government subsidization of the ideological and political viewpoint of anti-abortion activists. As a result, respondents who are pro-choice electoral activists are clearly injured in their abilities to participate in the electoral process. This injury to respondents as electoral activists can be articu-

14 This Court implicitly, and the lower court expressly, recognized that non-recipients of a government subsidy had suffered sufficient injury to confer Article III standing. Taxation with Representation of Washington v. Regan, 676 F.2d. at 744.

lated in three ways: the injury to respondents, first, as pro-choice voters and campaign workers; second, as contributors to pro-choice candidates and political committees; and third, as pro-choice candidates.

1. Electoral activists who are pro-choice voters and campaign workers are injured.

The IRS' failure to halt petitioners' use of tax-deductible dollars to finance their anti-abortion electoral activities has placed pro-choice voters and campaign workers at a comparative disadvantage by effectively subsidizing the partisan electoral advocacy of respondents' ideological opponents. As a result, petitioners' anti-abortion electoral message is magnified, and the voices of pro-choice voters and campaign workers are correspondingly muted. This partisan government subsidy of anti-abortion election messages burdens the First Amendment rights of pro-choice voters and campaign workers whose political viewpoints are not similarly subsidized, and fundamentally upsets the electoral

balance by granting an important advantage to only one side of the electoral debate.

It is well recognized that governmental action which interferes with the free exchange of political viewpoints constitutes sufficient injury to confer standing on voters. For example, in Common Cause v. Democratic National Committee, 333 F. Supp. 803 (D.D.C. 1971), the court held that individual activist members of Common Cause had standing based on their allegation that the federal election laws conferred upon some political candidates and parties an unfair advantage in an election by exempting those candidates and parties from the limitations of a campaign contribution statute. The court reasoned:

If . . . voters . . . comply with Sections 608 and 609 [of the Federal Election Campaign Act] while other candidates and their supporters do not, the votes of the plaintiffs and their efforts to effect the nomination or election of individuals of their choice are likely to be, as a practical matter, diluted or even nullified . . . Plaintiffs "are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes.'"

Id. at 808, citing Baker v. Carr, 369 U.S. 186 (1962) (footnote omitted).

In a similar manner, pro-choice voters and campaign workers who, unlike petitioners here, are not tacitly permitted by the IRS to finance their electoral activities with tax deductible dollars are injured by virtue of their inability to raise and spend the funds necessary to counteract the government-subsidized anti-abortion electioneering of petitioners. Indeed, the IRS' failure to stop petitioners from engaging in prohibited electioneering runs contrary to the clear command of Congress that the IRS more vigorously enforce § 501(c)(3)'s prohibition against partisan political activity.¹⁵

The suggestion made by the IRS in its brief that respondents' injury as voters is analogous to the injury of "any businessman" as a result of "government action that redounded to the financial benefit of his

¹⁵ See note 18, infra.

competitor," and therefore is not sufficiently "concrete," or particularized (Brief for Federal Respondents in Support of Petitioners, at 11), is disingenuous. Courts have traditionally applied heightened scrutiny where, as is the case here, the competition is in the political process, which is accorded the highest constitutional protection. Interests in such fundamental, constitutional rights are so great that plaintiffs need only show a very minor stake in the outcome. See Baker v. Carr, 369 U.S. 186, 206 (1962). Such interests are clearly distinct from the interests of commercial competitors with respect to governmental regulation.

2. Electoral activists who are contributors to pro-choice candidates and political committees are injured.

Contributors to pro-choice candidates and campaigns are clearly disadvantaged as a result of the IRS' inaction. Pro-choice supporters who wish to contribute to a pro-choice candidate or political campaign receive

no tax deduction for their contribution, while contributors to anti-abortion groups, such as petitioners, do receive a deduction. Anti-abortion groups are thus able to receive that much more money. This inequity diminishes the relative ability of the pro-choice contributor to participate in the political process.

The interests of pro-choice contributors are similar to plaintiff's interest in Tax Analysts and Advocates v. Shultz, 376 F. Supp. 889 (D.D.C. 1974). In Tax Analysts, a nonprofit organization challenged an IRS ruling that campaign committees, rather than the candidate, are the donees of contributions for the purposes of the \$3,000 gift tax exclusion. The individual plaintiff sought standing "[a]s a taxpaying citizen, voter, and small contributor to election campaigns," alleging that the government's action "has the effect on him of substantially diminishing his ability to affect the electoral process and to persuade elected officials to adopt policies and programs he favors." Id. at 899. The

court held that:

Plaintiff Field's alleged diminution of his vote and the dilution of his ability to affect the electoral process are judicially recognized wrongs and thus sufficient allegations of actual injury.

Id. Exactly the same injury here gives respondents standing in this case.

3. Electoral activists who are pro-choice candidates are injured.

There can be no doubt that pro-choice candidates for public office are injured by petitioners' efforts in support of the election of anti-abortion candidates, and in opposition to the election of pro-choice candidates. Pro-choice candidates and political committees cannot offer potential donors any tax incentives, because, as noted above, contributions to political candidates and committees are not deductible.¹⁶ Thus,

¹⁶ The limited income tax credit contained in 26 U.S.C. § 24 (1984) for political contributions was repealed by § 112 of the 1986 Tax Reform Act, Pub. L. No. 99-514, 100 Stat. 2108. Indeed, political organizations are now required to disclose to all potential donors that they are not eligible to receive

pro-choice candidates have fewer campaign resources than their anti-abortion opponents, who benefit from petitioners' partisan political expenditures financed by unlimited deductible contributions. Accordingly, pro-choice candidates are clearly injured if their political and ideological opponents receive tax-deductible dollars to finance their political activities.

This Court's decision in Buckley v. Valeo, 424 U.S. 1, 11-12 (1976), supports standing for respondents who are pro-choice candidates. In Buckley, this Court found that then-Senator Buckley had standing to challenge the constitutionality of the recently-enacted federal campaign expenditure and contribution limits because he was a candidate. The courts have recognized candidate standing to challenge congressional incumbents' use of the frank in election campaigns. See, e.g.,

deductible charitable contributions. See 26 U.S.C. § 6113, as added by the Omnibus Budget Reconciliation Act of 1987, Pub.L. No. 100-203, 101 Stat. ___, (Dec. 22, 1987).

Schiaffo v. Helstoski, 492 F.2d 413 (3d Cir. 1974); Hoellen v. Annunzio, 468 F.2d 522 (7th Cir. 1972), cert. denied, 412 U.S. 953 (1973).

B. The Injury Sustained By Respondents Who Are Electoral Activists Is A Direct Result of IRS' Inaction and the Relief That Respondents Request Would Redress Their Injury.

In order to satisfy the requirements of Article III, the injury to respondents' First Amendment rights to a fair electoral process must "fairly be traced to the challenged action of the defendant, and not injury that results from independent action of some third party not before the Court." Winpisinger v. Watson, 628 F.2d 133, 137 (D.C. Cir.), cert. denied, 446 U.S. 929 (1980); Warth v. Seldin, 422 U.S. at 511. In addition, respondents must demonstrate that "'there is a substantial probability' that, if the court affords the relief requested, his injury will be removed." Animal Welfare Institute v. Krepes, 561 F.2d 1002, 1009, cert. denied, 434 U.S. 1013 (1977) (footnote and citations omitted). These

requirements are clearly satisfied here.

Respondents' are seeking to protect their First Amendment rights to a fair electoral process, as distinct from any additional interest in achieving a particular electoral outcome.¹⁷ Their interest in a fair process is directly harmed by the IRS' toleration of de facto subsidization of the anti-abortion electioneering of petitioners. The injury can be directly redressed by an order that the IRS utilize its existing authority to enforce § 501(c)(3). Because the injury here alleged to respondents' interests in a fair electoral process is directly caused by IRS' inaction, this case is clearly different from Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 42-43 (1976), and Allen v. Wright, 468 U.S. 737 (1984), wherein this Court found Article III jurisdiction to be lacking because the connection between agency conduct and plaintiffs' injuries was too

¹⁷ See supra, note 12.

"speculative." Accordingly, respondents here clearly satisfy the Article III redressability requirement.

Similarly, in Common Cause v. Bolger, 512 F. Supp. 26 (D.D.C. 1980), aff'd, 461 U.S. 911 (1983), the court held that plaintiff Common Cause's challenge to the Congressional franking statute, brought on behalf of its members who were registered voters, satisfied the Article III's causality and redressability requirements for standing, stating:

[T]he causation requirements of the Warth and Winpisinger case are not in issue, because the asserted harm is the franking statute and defendants' action thereunder. There is no third party action complicating the issue. Plaintiffs are directly harmed by defendants' actions.

Id. at 28 (emphasis in original).

In a similar manner, the injury to respondents' First Amendment rights is directly a result of IRS' failure to enforce § 501(c)(3)'s prohibition against petitioners and can be remedied by an order that IRS enforce this provision.

C. This Court's Sensitivity to Separation of Powers Concerns And To Religious Freedom Counsel In Favor of Standing In This Case.

There are no "prudential considerations" that should bar standing in this case.

Unlike Allen v. Wright, 468 U.S. at 761, in which this Court denied plaintiffs' standing out of concern that the judicial relief requested would constitute an undue intrusion on the IRS' authority, respondents have not requested this Court to impose on the IRS new rules or procedures governing the enforcement of the Internal Revenue Code which would entangle the courts in ongoing monitoring of the IRS. To the contrary, respondents seek only to have the court direct the IRS to do what is already required by the Internal Revenue Code, namely, to enforce fairly § 501(c)(3)'s prohibition against partisan political activity.

The suggestion made by the IRS that recognizing respondents' standing would, in effect, grant private parties a right of

action under § 501(c)(3) and interfere with functions committed by Congress to IRS' discretion (Brief of Federal Respondents in Support of Petitioners, at 44-45), is without merit. First, no private right of action to enforce federal tax laws is being sought by respondents. Rather, respondents' right of action arises directly under the Constitution as a result of the injuries alleged by respondents' to their First Amendment rights. See Bivens v. Six Unknown and Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). See also discussion supra, at 14-15, on the distinction between the constitutional injuries asserted by respondents and the commercial or financial interests of taxpayers.

Second, recognizing respondents' standing would not undermine any Congressional mandate to IRS. To the contrary, recent congressional actions indicate Congress favors more vigorous IRS enforcement of § 501(c)(3)'s prohibition against partisan political activity by tax

exempt organizations. Congress recently enacted new legislation designed to halt abusive political activity by tax exempt organizations. Among these changes are a grant of extraordinary authority to the IRS Commissioner, in cases of flagrant political electioneering, to seek immediate injunctive relief, to assess taxes in addition to termination of § 501(c)(3) status, and take other appropriate action.¹⁸ Given this clear statement of congressional purpose, the Court should not be hesitant to recognize standing in the present case.

Moreover, respondents have not sought any unusual equitable relief. Respondents seek only for the agency to utilize the same procedure that it uses against (1) secular groups that engage in political activity,¹⁹ and (2) religious groups who violate other IRS

¹⁸ Omnibus Budget Reconciliation Act of 1987, 26 U.S.C. §§ 6852, 7409, Pub. L. No. 100-203, 101 Stat. ____ (Dec. 22, 1987).

¹⁹ See Rev. Rul. 78-248, 1978-1 C.B. 154.

rules.²⁰ These actions demonstrate that the IRS is well-equipped to perform the delicate task of investigating petitioners' alleged tax status violations, and has been provided statutory tools expressly designed for such delicate inquiries.²¹

Some amici in support of petitioners imply that standing should be denied to avoid the delicate issues which would be before the Court if the ARM case were being adjudicated on the merits.²² It would be wholly inappropriate to use a denial of standing as a means of avoiding difficult legal issues; indeed,

²⁰ See e.g., *Staples v. Commissioner*, No. 86-376 (8th Cir., July 1, 1987); *Universal Life Church v. Commissioner of Internal Revenue*, 87-2 U.S.T.C. para. 967 [CCH] (U.S. Claims Court, 1987), in which IRS revocations of the tax exemptions of religious organizations for violating other tax rules were upheld by the courts.

²¹ Church Audit Procedures Act, appearing at 26 U.S.C. § 7611 (1984). The statutory interests involved are those of the IRS in its mandate to enforce the tax code.

²² See, e.g. Brief Amicus Curiae of the National Council of Churches of Christ, in the U.S.A., et al., at 5 and 15.

amici for petitioners have cited no cases which suggest that the doctrine of standing can be used for that purpose. Should this case proceed on the merits, a court has the tools and ability to adjudicate the sensitive church-state separation issues implicated, and has already shown itself well able to do so.²³

Accordingly, this Court's attention to "prudential" issues counsels in favor of respondents' standing in this case.

²³ Even before the merits of this case have been reached, the District Court, in constructing discovery orders, has taken considerable pains to minimize the disruptive effect which the orders might have on the Church entities covered, by substantially reducing the scope of the discovery orders.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX A

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 National Abortion Rights Action League
 5th Floor
 1101 14th Street, N.W.
 Washington, D.C. 20005

Re: United States Catholic Conference, et al., v.
 Abortion Rights Mobilization, Inc., et al.,
 No. 87-416

Dear Ms. Stillson:

On behalf of the United States Catholic Conference and the National Conference of Catholic Bishops, I consent to your filing an amicus curiae brief in this case on behalf of the National Abortion Rights Action League and others.

Very truly yours,

Kevin T. Baine
 Kevin T. Baine

KTB/vlc



U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

February 5, 1988

Marion Stillson, Esq.
National Abortion Rights Action League
1101 14th Street, N.W., 5th Floor
Washington, D.C. 20005

Re: United States Catholic Conference v. Abortion
Rights Mobilization, Inc., et al., No. 87-416

Dear Mr. Stillson:

This is in response to your letter of February 3, 1988.

On behalf of the United States, I hereby consent to the filing of an amicus curiae brief on behalf of the National Abortion Rights Action League and possibly other organizations in the above case.

Sincerely,

Charles Fried
Charles Fried
Solicitor General

MARSHALL BEIL

ATTORNEY AT LAW ■ 19 WEST 44 STREET NEW YORK, NEW YORK 10036 TELEPHONE: 212 375-8500

February 9, 1988

Marion Stillson, Esq.
Staff Attorney
National Abortion Rights
Action League
1101 14th Street, N.W. - 5th Floor
Washington, D.C. 20005

USCC v. ARM, No. 87-416

Dear Marion,

In response to your letter of February 3, 1988, respondents Abortion Rights Mobilization, et al., consent to the filing of an amicus curiae brief in this matter by the National Abortion Rights Action League and other organizations.

Sincerely,

Marshall Beil
Marshall Beil

MB/fc
cc: Lawrence Lader

APPENDIX B

CERTIFICATE OF SERVICE

I hereby certify that I have caused three (3) copies of the foregoing Brief of Amici Curiae National Abortion Rights Action League, et al., to be served by first class mail postage prepaid upon:

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Solicitor General
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on or before March 11, 1988.



ELLYN R. WEISS
Counsel of Record for Amici Curiae
National Abortion Rights
Action League, et al.